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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., P. LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on November 21, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, pp. 1a-40a)[1] is not yet reported. The letter ruling of the Federal Communications Commission, dated June 2, 1967 (App. A, pp. 14-17) is reported at 8 F.C.C.2d 381, and the Commission's Memorandum Opinion and Order, dated September 8, 1967 (App. A, pp. 37-105) are reported at 9 F.C.C.2d 921.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1968. (App. B, pp. 41a-43a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission has ruled that all television and radio stations which carry routine product advertisements for cigarettes are obligated under the "Fairness Doctrine" to devote a "significant amount of time each week" to broadcasting the view that cigarette smoking is hazardous to health. The Court of Appeals, by a vote of 2 to 1, sustained the requirement. The questions presented are:

1. Has the FCC been granted statutory authority to adopt this requirement—more particularly, do the provisions of the Communications Act which empower the FCC to grant and renew broadcasting licenses as re-

[1] "App." refers to the separately-bound Appendix to this petition and the petitions in three related cases, forty copies of which have been filed with the Clerk of this Court. "J.A." refers to the Joint Appendix in the court below. "R." refers to the original record in the court below. Copies of both these documents also are on file with the Clerk of this Court.

quired by the "public interest, convenience or necessity" constitute a Congressional grant of authority to impose this regularly recurring obligation on licensees?

2. If authorized by statute, is the imposition of this obligation by the FCC on broadcasting stations consistent with the First Amendment when it would be clearly unconstitutional for any agency of government to impose a similar requirement on newspapers or magazines?

3. Was it arbitrary, capricious, and violative of due process of law for the FCC (a) to rule that the "Fairness Doctrine" applies to the product advertising of only one commodity—cigarettes—and (b) to render its decision without hearing any testimony or examining a single cigarette product advertisement?

4. Is the FCC's ruling applying the "Fairness Doctrine" to cigarette product advertising consistent with the Federal Cigarette Labeling and Advertising Act?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Sections 307(a) and (d), 309(a), 315(a), and 326 of the Communications Act of 1934, 48 Stat. 1083, 1085, 1088, 1091, as amended, 73 Stat. 557 (1959), 47 U.S.C.

§§ 307(a),(d), 309(a), 315(a), 326; and Sections 2, 4, 5 and 10 of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282-84 (1965), 15 U.S.C. §§ 1331, 1333, 1334, 1339, are set forth in Appendix C, pp. 45a-49a.

STATEMENT

1. The Administrative Proceedings.

This case arose when John Banzhaf, a New York lawyer, wrote two letters on his own behalf in December 1966 to television station WCBS-TV in New York demanding that the station give him free broadcast time to reply to routine product advertisements for cigarettes. Banzhaf asserted that the "question of the advisability of smoking is clearly a controversial issue of public importance"; that "all cigarette advertisements" express a point of view on this issue; and that the station was obligated under the FCC's "Fairness Doctrine" to give free time to proponents of the anti-smoking viewpoint "roughly in proportion" to the time devoted to cigarette commercials. (J.A. 6, 7, 9.)

By letter of December 30, 1966, WCBS-TV rejected Banzhaf's request for free time on the grounds that it had presented broad and fair coverage concerning "the health ramifications of smoking" and that, in any event, the "Fairness Doctrine" was inapplicable to product advertising. (J.A. 11-13.) Thereupon, Banzhaf wrote to the FCC complaining that WCBS-TV had failed to comply with the "Fairness Doctrine." He enclosed copies of the correspondence between him and the station; no copies of any cigarette commercials accompanied the complaint. (J.A. 2-13.)

Although it is the FCC's professed practice when a "Fairness Doctrine" complaint is made to give the licensee notice and opportunity to reply,[2] the FCC did not do so in this case. Instead, on June 2, 1967, it sent WCBS-TV a letter, which it said constituted its ruling on the Banzhaf complaint, stating:

> "We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. . . . We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." (App. A, p. 15.)

The FCC rejected Banzhaf's demand that anti-smoking advocates should receive free time "roughly approximate" to that used by cigarette commercials on grounds that such action would be "inconsistent with the Congressional direction in this field" provided in the Cigarette Labeling and Advertising Act. But it ruled that stations which carry cigarette commercials must "provide a significant amount of time . . . each week to cover the viewpoint of the health hazard posed by smoking." (*Id.*, pp. 15, 16-17.)

Following public release of this letter ruling—made without any notice or opportunity to be heard, either to WCBS-TV or any other interested party—petitions for reconsideration were filed by the present petition-

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[2] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416, 2 P & F RADIO REG. 2d 1901, 1905 (1964) (hereafter "Fairness Primer").

ers,[3] the National Association of Broadcasters, each of the three major networks, and a large number of other broadcasting and advertising groups affected by the decision. The various petitions stated, *inter alia*, that the FCC had no statutory authority to apply the "Fairness Doctrine" to product advertising and that, in any event, its application to cigarette advertising was foreclosed by the Cigarette Labeling Act. (See, *e.g.*, R. 352-67, 403-500.) On September 8, 1967, without having taken any evidence, the Commission issued a Memorandum Opinion and Order denying reconsideration and reaffirming its earlier ruling, which it expressly made applicable to all broadcast licensees. (App. A, pp. 37-105.)

In a lengthy memorandum, the Commission reviewed the background and purpose of the "Fairness Doctrine," which requires broadcast licensees to afford a reasonable opportunity for discussion of divergent views on controversial issues. (*Id.*, pp. 43-49.) The FCC defined the controversial issue invoking the "Fairness Doctrine" as follows: "that however enjoyable, such smoking may be a hazard to the smoker's health." (*Id.*, p. 39. See also *Id.*, p. 72.) The Commission ruled that cigarette advertisements by implication express a point of view on this issue, although the Commission acknowledged that it had not examined the text of any particular cigarette advertisement. (*Id.*, p. 81, n. 30.) The FCC brushed aside the points that cigarette

[3] Petitioner, The Tobacco Institute, Inc., a New York membership corporation, is a voluntary association of United States manufacturers of tobacco products, including six of the eight manufacturers which are petitioners. These eight cigarette manufacturer petitioners together account for nearly all the cigarettes manufactured in the United States. These manufacturers promote the sale of their cigarettes, among other means, by paid advertisements over radio and television.

commercials do not make any health claims and that claims that smoking is not hazardous have for many years been prohibited by the Federal Trade Commission. (*Id.*, pp. 59, 70, 92-93.)

The Commission found statutory authority for extending the "Fairness Doctrine" to routine product advertising in the obligation of licensees to operate in the "public interest" and in the ostensible adoption of the "Fairness Doctrine" by Congress in the 1959 amendment to Section 315 of the Communications Act, 47 U.S.C. § 315. (*Id.*, pp. 44-45, 48.) Constitutional attacks on the "Fairness Doctrine" were summarily rejected, largely on the authority of the decision of the Court of Appeals in *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967).

The Commission also reviewed the legislative history of the Cigarette Labeling and Advertising Act and various governmental reports relating to smoking and health and concluded that its "ruling is within our statutory authority and [is] not precluded by the Congressional policy embodied in the Labeling Act." (*Id.*, p. 66.) The Act provides, *inter alia*, that "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The Commission acknowledged that the Cigarette Act would preclude a regulation which would require either a cessation of cigarette advertising or the inclusion of a health warning in or adjacent to cigarette advertisments. (*Id.*, p. 49, 51.) But it concluded that the Act did not preclude it from requiring broadcasters under the "Fairness Doctrine" to allot "a significant amount of time" to anti-smoking advocates.

The FCC also stated:

> "[O]ur ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising." (*Id.*, p. 77.)

It rationalized this singling out of cigarette advertising on two grounds: (i) there are "governmental and private reports and Congressional action with respect to cigarettes"; and (ii) these assert that "'normal use of this product can be a hazard to the health of millions of persons.'" (*Id.*, p. 76.)

In response to the procedural objections to the manner in which it had arrived at its decision of June 2, the Commission said that its consideration of the pleadings filed after that decision satisfied the requirements of due process. It also stated that any procedural defect would be cured by giving its ruling only prospective effect. (*Id.*, pp. 80-82.)[4]

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[4] Two weeks following issuance of its opinion, the FCC received a request from a broadcaster, Metromedia, Inc., for "clarification" of a portion of its ruling. (R. 888.) In the course of its Memorandum Opinion, the FCC had stated:

> "We see no inequity in the circumstance that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programming. *The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials.*" (App. A, p. 70.) (Emphasis supplied.)

On September 21, 1967, without prior notice to anyone, the FCC "withdrew" the italicized sentence and ruled that licensees are not required to present the views of responsible spokesmen in reply to broadcasts that cigarettes are hazardous to health. (*Id.*, pp. 106-08.) On December 21, 1967, the FCC denied the Tobacco Institute's Petition for Reconsideration of its September 21 ruling. (*Id.*, pp. 113-15.)

Commissioner Loevinger wrote a separate concurring opinion in which he expressed his "doubts that the [Commission's] action is procedurally and substantively consistent with controlling legal rules." (*Id.*, p. 93.) He found the FCC's affirmation of statutory authority for its action "most dubious"; warned that extension of the "Fairness Doctrine" to product advertising "is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable"; and said that "the Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health." (*Id.*, p. 96.) He concluded that the ruling was "the result of sentiment rather than conviction," but reluctantly concurred because he was "as persuaded as the Commission majority and its draftsmen that smoking is hazardous and injurious to the health of smokers." (*Id.*, p. 100.) Commissioner Johnson also wrote a separate concurring opinion taking issue with various points made by Commissioner Loevinger. (*Id.*, pp. 101-105.)

2. The Opinion of the Court of Appeals.

Upon review by the Court of Appeals for the District of Columbia Circuit under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342, the FCC's ruling was upheld by a divided Court. (Bazelon, C. J. and Wright, J.; Miller, J. dissenting.)

The Court first rejected the contention that the FCC's ruling was foreclosed by the Cigarette Labeling Act. The Court said the FCC's ruling "does not violate the letter of the Act" since it does not require the inclusion of a warning "statement . . . in the advertising" itself. (App. B, p. 7a.) The Court justi-

fied this admittedly "relatively narrow reading of the Act" on the ground that the FCC ruling did not conflict with Congressional intent to protect cigarette manufacturers against conflicting requirements as to the content of cigarette advertising. (*Id.*, p. 13a.)

The Court went on to hold that the FCC is empowered to regulate the content of TV and radio programs by virtue of its authority under Sections 307(a) and (d) of the Communications Act to grant or renew broadcast licenses according to the "public interest, convenience, and necessity." (*Id.*, pp. 18-23.) The Court recognized that in view of First Amendment considerations the "public interest" is too vague a standard for administrative regulation of program content. (*Id.*, p. 24a.) It said, however, that the "'public interest' indisputably includes the public health," and consequently that the Commission may invoke this allegedly more specific standard to regulate the content of broadcasting. (*Id.*, p. 25a.) The Court added that "we are not prepared to say that the Commission is authorized to condemn every broadcast which might . . . be thought to pose some danger to the public health," but it expressed agreement with the FCC's position that "cigarette advertising presents a unique situation." (*Id.*, pp. 26a, 27a, n. 63, 30a.)

The Court acknowledged there was "considerable force" in the argument that the FCC's ruling violates the First Amendment, but it rejected the constitutional objection on the grounds that the Amendment applies differently to the broadcast media than to printed media; that the ruling would probably not inhibit any but "marginal" speech; that product advertising is not entitled to the same degree of protection as other

forms of speech; and that, even if "valued" speech were inhibited, the ruling is a proper device for balancing the relative financial resources of the adversaries on both sides of the smoking-health issue. (*Id.*, pp. 30a-38a.)

Finally, the majority ruled that it was proper for the FCC to issue its ruling without examining any actual cigarette advertisement, or any other evidence, even though it agreed that "as a general rule . . . more careful procedures are required to support innovation by an administrative agency." (*Id.*, pp. 39a-40a.)

Judge Wilbur K. Miller dissented, but he did not file an opinion.

REASONS FOR GRANTING THE WRIT

The present case—the first in which the "Fairness Doctrine" has been applied to routine product advertising—raises novel and important questions relating to the administration of the Communications Act and the constitutional limits on the FCC's authority to prescribe what must be broadcast over radio and television. The issues involved are of immense practical importance in the day-to-day operations of the FCC, the broadcasting industry, and for advertisers generally.

The novelty and far-reaching implications of the present ruling were perceived by the Commission and the Court of Appeals. The FCC recognized that its decision was "a precedent on an important issue" (App. A, p. 40); Commissioner Johnson in his concurring opinion noted this is "a case of landmark importance" (*Id.*, p. 101); and the Court of Appeals viewed the FCC's ruling as "a novel application" of the "Fairness Doctrine" and "an unusual limitation of the licensee's discretion." (App. B, pp. 15a, 16a, 24a.)

As the Court below stated, "except for the personal attack rules struck down by the Seventh Circuit [in *Radio Television News Directors Ass'n* v. *United States,* 400 F.2d 1002 (1968) *cert. granted,* No. 717, Jan. 13, 1969] we know of no case in which the Commission has so specifically defined the stations' duties under the fariness doctrine." (*Id.,* p. 16a.) The Court below also recognized that prior to the instant case "the Commission has been hesitant to invoke the fairness doctrine when a controversial issue is raised only by implication." (*Id.*)

With regard to application of the First Amendment, the ruling of the Court below that there is a "meaningful distinction" between the newspaper press and broadcasting, such as to justify sustaining an FCC regulation which would be clearly invalid if applied to the printed press, is in conflict with the Seventh Circuit's decision in *Radio Television News Directors Ass'n* v. *FCC, supra.*

The importance of the issues raised by the ruling in this case is underscored by this Court's recent grant of certiorari in two related cases, *Red Lion Broadcasting Co., Inc.* v. *FCC,* No. 2, and the *Radio Television News Directors* case, *supra.* Should the Court hold in those cases that the "Fairness Doctrine" or the FCC's "personal attack" rules thereunder are unauthorized by statute or in conflict with the Constitution, it would follow that the present ruling cannot stand. But even if the Court upholds the FCC in those cases, we submit for the reasons discussed below that the significantly farther-reaching ruling in this case would still be invalid. In any event, this case presents a striking added dimension to the issues raised by *Red Lion* and *News Directors,* and review of the

important questions in this complementary case is clearly warranted.

Furthermore, the FCC has now seized upon the decision of the Court of Appeals in this case as justification for an even more far-reaching assertion of authority. In a Notice of Proposed Rule Making adopted February 5, 1969, the FCC proposes to consider a rule completely prohibiting the broadcast of cigarette commercials by radio and television stations. (*In the Matter of Amendment of Part 73 of the Federal Communications Commission Rules with regard to the advertisement of cigarettes,* FCC Docket No. 18434.) The FCC specifically relies on the decision of the Court below for the proposition that the "public interest" standard of the Communications Act not merely authorizes but *requires* it to place an outright ban on cigarette advertising by broadcast licensees. Thus, the decision below has already had enormous consequences for the broadcasting, advertising, and tobacco industries.

In addition to the foregoing grounds for review, the FCC's arbitrary limitation of its ruling in the present case to the advertising of a single product—cigarettes—and its issuance of the ruling without advance notice to any interested party or any kind of hearing raise substantial questions concerning the standards which should be observed by an administrative agency in making a significant decision.

Finally, as we discuss below, the FCC's ruling conflicts with the regulatory scheme for cigarette labeling and advertising established by Congress in 1965 in the Cigarette Act. This case raises serious questions of first impression as to the meaning of that statute and its interrelationship with the Communications Act.

I. THE FCC'S RULING LACKS STATUTORY AUTHORIZATION.

The important threshold issue in this case is whether the FCC has statutory authority to issue the ruling in question.[5] The Commission minimized this issue, but the Court of Appeals devoted a large portion of its opinion to searching for a sufficient statutory basis for the FCC's action. (App. B, pp. 14a-30a.)

There is no statute which specifically authorizes the FCC to require licensees who carry routine cigarette commercials to devote a significant amount of free broadcast time every week to propagating the message that smoking is a health hazard. The only statutory foundations advanced by the majority below to support this concededly "unusual limitation of the licensee's discretion" are the general provisions of the Communications Act which, in the majority's words, "go no farther than to authorize [the FCC] to grant and renew broadcast licenses according to the dictates of the 'public interest, convenience and necessity.'" (*Id.*, p. 18a.)[6]

We submit this is an inadequate statutory basis for a far-reaching edict of a regulatory agency prescribing what must be broadcast over radio and television stations. This Court has made clear repeatedly that,

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[5] It is axiomatic that an administrative agency possesses "only such powers as are granted by statute. It may make only such orders as [its governing] Act authorizes." (Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 598 (1934).)

[6] The majority cited Sections 307(a) and (d) of the Communications Act of 1934, 48 Stat. 1083, 47 U.S.C. §§ 307(a), (d). These provisions, as well as Section 309(a), 48 Stat. 1085, 47 U.S.C. § 309(a), dealing with construction permits, and Section 315(a), 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a), relied on by the FCC as statutory authority for the "Fairness Doctrine," are set forth in Appendix C, pp. 45a-47a.

"explicit [administrative] action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." (*Greene* v. *McElroy*, 360 U.S. 474, 507 (1959). See also *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946).)

As this Court's recent grant of certiorari in *Red Lion* and *News Directors* attests, the present case involves an "area of doubtful constitutionality." The FCC gave the First Amendment short shrift in this case,[7] but the Court of Appeals candidly acknowledged that the Commission's ruling raises serious constitutional problems. (App. B, pp. 31a-32a.) Nevertheless, in upholding the Commission, the majority of the Court below ignored the fundamental requirement of a clear legislative mandate for administrative regulatory activity trespassing into constitutionally sensitive areas.

Unlike the FCC—which was content to premise its authority solely on the "public interest" concept—the Court below flatly held that this amorphous standard was insufficient legislative support for the FCC's ruling. (*Id.*, pp. 24a-25a.) The majority incorporated a new regulatory standard into the Communications

[7] The FCC made no reference to the First Amendment in its June 2 letter ruling, and devoted only a brief paragraph to it in its Memorandum Opinion and Order. (App. A, pp. 42-43.) In its brief to the Court of Appeals, the FCC brushed off the First Amendment attack on its ruling as "well-nigh frivolous." (Brief for Respondents, p. 55.)

Act: the "public health." In effect, the majority read the statute as if it provided in substance as follows: "The Commission may require licensees to grant a significant amount of free time each week to spokesmen who oppose a point of view found to be implicit in product advertising if the product advertised is the subject of a controversy involving the public health." Such radical restructuring of the Commission's organic act is a function which must be left to Congress.[8]

In its original June 2 ruling, the FCC attempted to justify its decision as a straight-forward application of the "Fairness Doctrine." The doctrine, however, has always focused on the "discussion"—indeed the explicit "discussion"—of controversial issues.[9] To

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[8] Whenever Congress has intended to authorize the regulation of program content by the FCC—*e.g.*, restrictions on obscenity, profanity, lotteries, and deceptive contests, and the equal-time requirement for political broadcasts—it has always done so explicitly and has not relied upon the nebulous "public interest" standard. (See Communications Act, §§ 316, 326, 509, 48 Stat. 1088, 1091 (1934), as amended, 62 Stat. 763, 769 (1948), 74 Stat. 897 (1960), 18 U.S.C. §§ 1304, 1464, 47 U.S.C. § 509.)

[9] As the FCC acknowledged in its Memorandum Opinion, it has always previously "distinguished between explicit and implicit raising of controversial issues," applying the "Fairness Doctrine" only when the issue is raised explicitly. (App. A, p. 69, n. 21.) It recently applied this distinction in denying an atheist's request for time to respond to the advocacy of religion alleged to be implicit in the regular broadcasting of church services. (Miss Madalyn Murray, 5 P & F Radio Reg. 2d 263, 266-67 (1965).) The text and legislative history of the 1959 amendment to Section 315 of the Communications Act, which the FCC views as the Congressional endorsement of the "Fairness Doctrine," reveal that Congress also understood that the doctrine applies only to the explicit "discussion" of controversial issues. (See App. C, pp. 46a-47a; S. Rep. No. 562, 86th Cong., 1st Sess., p. 13 (1959); 105 Cong. Rec. 14446, 14458, 17830 (1959) (remarks of Senators Proximire, Hartke and Pastore).)

expand it to embrace the jingles and fantasies of many commercials—including the whimsical cigarette advertisements to which Banzhaf objected—distorts the doctrine beyond recognition. (See J.A. 2-3, 31-36.) From the time of the doctrine's first systematic formulation in the 1949 *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 25 P & F RADIO REG. 1901, until the present case, the FCC had never indicated in any way that the "Fairness Doctrine" is applicable to routine product advertising—and with good reason. The genesis and purpose of the doctrine was the FCC's concern with advancing public understanding of controversial issues by assuring full and balanced presentation and discussion of these issues.[10] It is an exercise in unreality to regard the ordinary commercial advertisement—urging the audience to buy this or that product—as containing a presentation and discussion of a viewpoint with respect to a public controversy.

II. THE RULING RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The ruling in the present case—which is significantly more restrictive of free speech than the FCC's "personal attack" rulings involved in *Red Lion* and *News Directors*—raises substantial First Amendment issues which merit consideration by this Court.

There is no doubt that the First Amendment would prohibit a governmental agency from requiring a newspaper or magazine which prints cigarette advertising

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[10] *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1249, 25 P & F RADIO REG. 1901, 1902, 1905 (1949); *"Fairness Primer," supra,* n. 2, 29 Fed. Reg. at 10416, 2 P & F RADIO REG. 2d at 1902; *In the Matter of Amendment of Part 73 of the Rules,* 10 P & F RADIO REG. 2d 1901, 1905.

to donate space—much less "a significant amount" of space "each week"—for the message that smoking is a health hazard. The FCC and the majority of the Court below sought to distinguish broadcasters from publishers on grounds of the need for technical regulation of the airwaves and the scarcity of broadcast frequencies. The ruling of the Court below on this point is squarely in conflict with the Seventh Circuit's decision in *Radio Television News Directors Ass'n, supra,* which invalidated the FCC's "personal attack and political editorial" regulations on First Amendment grounds.

As the Seventh Circuit properly ruled, it does not follow from the fact that the FCC must regulate the technical aspects of broadcasting that it may regulate program content. "[T]he traditions of the First Amendment do not evaporate because there is licensing. . . . The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license." (Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15, 37 (1967).) Moreover, whatever might have been said of the scarcity argument in the early days of radio, at present—with over 6,000 commercial broadcasting stations in operation and broad vistas opening up in the UHF band, community antenna systems, public broadcasting channels, and pay TV—the factual premise simply does not exist.

The present ruling goes far beyond the "personal attack" rules invalidated by the Seventh Circuit. Unlike the "personal attack" situation, which may occur

infrequently in practice and which requires the grant of a relatively small amount of free time, the ruling here imposes a continual, regular obligation on licensees and involves an appreciable amount of time. It forces stations to choose between two impermissibly restrictive alternatives: either they exercise self-censorship and refuse to broadcast any cigarette commercials, or they are compelled to devote substantial free time "each week" to the broadcasting of a particular message—that smoking may be a health hazard. That message is not simply whatever one who has been attacked in a broadcast wishes to offer in his own defense; rather, it is the "party line" which has been taken by some agencies of the federal government on the smoking-and-health issue, a position vigorously disputed by various responsible quarters of the scientific community.[11] (See, *e.g.*, S. Rep. No. 195, 89th Cong., 1st Sess., p. 3 (1965); App. A, p. 54.) The FCC has not merely established a duty to grant time; it has in effect prescribed the *content* of the broadcast. The notion that private broadcasters can be compelled to propagate the viewpoint of particular governmental agencies, at their own expense and under the threat of losing their valuable franchises, is totally repugnant to basic notions of free speech and a free press.[12]

The FCC's ruling cannot be saved from constitutional infirmity merely by asserting, as did the majority of

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[11] If certiorari is granted, petitioners reserve the right to argue, as they did before the FCC and the Court of Appeals, that if the FCC may validly require the broadcasting of messages proclaiming that smoking is hazardous, it must in fairness accord cigarette companies the right to reply.

[12] This dictation of required programming also contravenes the prohibition on censorship in Section 326 of the Communications Act. (App. C, p. 47a.)

the Court below, that it "probably" will not result in a "chilling" or reduction of cigarette advertisements. Since no evidence was taken in this case, there is nothing whatsoever in the record to support this premise. In any event, the argument misconceives the scope of the First Amendment. That provision protects the citizen not only against governmental prohibitions on what he wishes to say, but also against governmental dictation of what he must say. (See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).)[13]

Moreover, the FCC's recent proposal to ban cigarette advertising on radio and television altogether—in reliance on the authority purportedly established by the decision below—shows that the threat of governmental censorship in contravention of the Communications Act and the First Amendment is not imaginary but real and substantial. Emboldened by the decision in the present case, the FCC has now abandoned the pretense that it is merely concerned with furthering the public discussion and understanding of a controversial issue of public importance. It has now reached out for the role of censor and has flatly asserted that the First Amendment poses no barrier to

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[13] The Court below also mistakenly relied upon *Valentine* v. *Chrestensen*, 316 U.S. 52 (1943), and other cases suggesting that commercial advertising may be entitled to a lesser degree of protection under the First Amendment. Whatever the validity of this dubious proposition, it is wholly inapplicable in this case where the essential premise of the FCC's ruling is that broadcasting cigarette product advertisements is tantamount to discussing and "disseminating opinion" on a controversial issue—activities which are acknowledged in *Valentine* to be protected by the First Amendment. (See 316 U.S. at 54.)

its control over advertising on the nation's broadcasting media. (*In the Matter of Amendment of Part 73 of the Federal Communications Commission Rules with regard to the advertisement of cigarettes,* FCC Docket No. 18434, pp. 14-15.) Thus the "stealthy encroachment" on First Amendment rights represented by the decision below has already become an open assault. (See *Boyd* v. *United States,* 116 U.S. 616, 635 (1886).)

III. THE FCC'S RULING WAS ARBITRARY.

A. The FCC stated that its ruling "applies only to cigarette advertising, and imposes no fairness doctrine obligation upon petitioners with respect to other product advertising." (App. A, p. 77.) The Court of Appeals affirmed this ruling in a brief footnote. (App. B, p. 27a, n. 63.) We submit that singling out cigarettes for unique treatment in applying the "Fairness Doctrine" to commercial advertising is arbitrary. Such an abuse of agency and judicial power warrants correction by this Court.

The grounds relied on by the FCC and the Court below to differentiate cigarettes from other product controversies will not survive scrutiny. The existence of "governmental and private reports and Congressional action" is certainly not unique to cigarettes. There are controversies over the possible hazards of many products—*e.g.,* products containing cholesterol and fluorides, beer, wine, vitamins, proprietary drug products for colds, headaches, and insomnia, insecticides, and air travel—and many products and business activities have been the subject of reports and legislative action dealing with their relationship to health

or safety.[14] Automobiles are the most prominent recent example of a product which has been the subject of a major safety controversy; that controversy has generated a voluminous literature and produced the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. §§ 1381, *et seq.*

The FCC's other ground for distinguishing cigarettes—that reports on cigarettes assert that "normal use of this product can be a hazard to the health of millions of persons" (App. A., p. 76)—is equally defective. It is precisely the *normal* use of automobiles which is alleged to constitute the threat to public safety—the leading item of controversial literature charges that American automobiles are "Unsafe At Any Speed."[15] The same is true of many other products and business activities about which there have been significant public controversies. For example, it is the normal use of products containing cholesterol, alcoholic beverages, products containing fluorides, and airplanes which is said to constitute a danger to health

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[14] *E.g.*, Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301 *et seq.*; Federal Hazardous Substances Labeling Act, 74 Stat. 372 (1960), as amended, 15 U.S.C. §§ 1261 *et seq.*; U.S. Dept. of HEW, *Alcohol and Accidental Injury* (1966); U.S. Dept. of HEW, *Diet, Cholesterol and Arteriosclerosis,* Heart Research News (Summer 1965); Public Health Service, 1966 National Dental Health Assembly (with emphasis on fluoridation) PHS Publication No. 1552 (1966); Report of President's Science Advisory Committee, *Use of Pesticides* (May 1953); R. Carson, *Silent Spring* (1962).

[15] R. Nader, *Unsafe At Any Speed* (1965). Similarly, as Commissioner Loevinger pointed out in his concurring opinion (App. A, p. 96), the normal use of automobiles is one of the primary causes of air pollution, which poses a threat not merely to the safety of users of automobiles and pedestrians, but to the health of the entire population in some localities.

or safety by many persons involved in the controversies over such products.

Why should the "Fairness Doctrine" be applied only to cigarette advertising, assuming that it may be applied to any advertising? The answer must be that the FCC has taken one side of the controversy over cigarettes and health, that it concluded that smoking is hazardous to health—although this is what the controversy is all about—and that it decided to take action against cigarette advertising in order to achieve what it presumes to be in the public interest.[16] As Commissioner Loevinger pointed out, however, "the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e., 'in the public interest')." (App. A, p. 96.) Once again, the Commission has failed to heed this Court's admonition, issued in connection with a previous effort of the FCC to read its own views of social policy into the law:

> "Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of [a governing statute] does not provide the remedy." *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 297 (1954).

B. The arbitrariness of the FCC's action in this case is underscored by the unprecedented and precipitate

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[16] Prior to the present case, it was a firmly established principle that, in applying the "Fairness Doctrine," the FCC had no authority to take sides in the controversy. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 924 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967); *Report on Editorializing, supra*, n. 10, 13 F.C.C. at 1255-56, 25 P & F RADIO REG. at 1911; *"Fairness Primer," supra*, n. 2, 29 Fed. Reg. at 10427, 2 P & F RADIO REG. 2d at 1925.

manner in which the ruling was promulgated. In the first place, despite the Commission's prior uniform rulings that its resolution of "Fairness Doctrine" issues must turn on a careful examination of specific facts,[17] the FCC in this case flatly refused to hear any evidence or examine even a single cigarette commercial. It simply asserted that *all* cigarette commercials, *per se*, present a position on the smoking-and-health issue. There is no evidence in the administrative record before the FCC to support this dictum. Moreover, contrary to its stated policy and practice in other cases (see n. 2, *supra*) and its procedural obligations under Section 4 of the Administrative Procedure Act,[18] the FCC handed down its initial ruling without first providing interested parties notice and an opportunity to be heard. The Commission's receipt of petitions for reconsideration did not remedy this defect. The FCC did not invite the presentation of evidence; it did not accord an oral hearing to any party. Having once committed itself, it could scarcely be expected to apply an independent judgment to the validity of its own prior action.

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[17] "*Fairness Primer*," *supra*, n. 2, 29 Fed. Reg. at 10416, 2 P & F RADIO REG. 2d at 1904; Capitol Broadcasting Co., 2 P & F RADIO REG. 2d 1104, 1107 (1964).

[18] Section 4(b) provides that:

> "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . ." 60 Stat. 239 (1946), 5 U.S.C. § 553(c).

It seems clear, as Commissioner Loevinger pointed out, that the Commission proceeded in this headlong fashion because it was "so eager to take its present position." (App. A, p. 94.) This Court should not sanction these procedures.

IV. THE FCC'S RULING CONFLICTS WITH THE PRE-EMPTIVE PROVISIONS OF THE CIGARETTE LABELING ACT.

This is the first case testing the meaning of the pre-emption provisions of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39, which significantly affects the vast interests involved in the growing, processing, manufacturing, distributing, and advertising of cigarettes, including the national and local governmental interests in tobacco tax revenues. The case is also one of first impression regarding the interrelationship of the Cigarette Act with the Communications Act of 1934.

We submit that the FCC and the Court below failed to accord proper scope to the pre-emptive provisions of the Cigarette Act. The Act, adopted in 1965 after extensive hearings on the smoking-and-health issue, makes a sharp distinction between the package label and advertising. It requires that a prescribed cautionary statement be placed on the package label of all domestically sold cigarettes, and precludes the requirement of any other statement on the package relating to smoking and health. (Sections 4, 5(a), 15 U.S.C. §§ 1333, 1334(a).) Regarding advertising, however, the Act provides that, prior to July 1, 1969, "No statement relating to smoking and health shall be required in the advertising of any cigarettes, the pack-

ages of which are labeled in conformity with the provisions of this Act." (Section 5(b), 15 U.S.C. § 1334(b).)[19]

The Cigarette Act represents a studied legislative compromise which was disrupted by the FCC's ruling in the present case.

First, as explained by Senator Cotton, one of the senior members of the Senate Commerce Committee, it was the Congressional intent "that at this time Congress should go only to the point of placing a plain and effective warning on each package of cigarettes, and that *any restriction in the matter of advertising in magazines and on television and elsewhere should be held in abeyance . . . .*" (111 Cong. Rec. 13899 (1965); emphasis supplied.) Congress clearly rejected the premise, which underlies the FCC's present ruling, that cigarette product commercials must be counterbalanced by other advertising with health-warning messages, and unequivocally determined that the pre-

[19] The fact that the provisions of the Act which affect the regulation of advertising terminate on July 1, 1969 (Labeling Act, Section 10, 15 U.S.C. § 1339) does not render this particular question unworthy of this Court's review. There are bills now pending in Congress which would extend the moratorium on the regulation of advertising. (*E.g.*, H.R. 3053, 6543, 6544 and 6545, 91st Cong., 1st Sess. (1969).) Moreover, under the FCC's ruling, all licensees have been in jeopardy of losing their licenses if, starting in September, 1967, they have not properly carried out the FCC's mandate. Indeed complaints seeking revocation of broadcasting licenses for alleged noncompliance with the present ruling are currently pending before the FCC. (See N.Y. Times, June 13, 1968, at 93, cols. 1-4; Wall Street Journal, June 13, 1968, at 12, cols. 3-6 (Eastern ed.).) Thus, even if the moratorium expires, serious consequences may still arise out of licensee conduct during its existence.

scribed cautionary notice on cigarette package labels constituted "adequate warning" of any health hazards that might be connected with cigarette smoking. (Section 2, 15 U.S.C. § 1331.)

Second, Congress intended to preclude "piecemeal" regulation of the smoking-and-health problem by various federal administrative agencies. Significantly, the FCC, when asked by the Senate Commerce Committee to express its views on pending bills, acknowledged its own limited jurisdiction and stated that it was "clearly appropriate . . . that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion," *i.e.,* cigarette advertising should not be regulated by an agency, such as the FCC, which has jurisdiction over only two of the various advertising media. (S. Rep. No. 195, 89th Cong., 1st Sess., p. 13 (1965).) The Court below minimized this representation to Congress by the FCC, saying that "while it is possible that had the FCC then anticipated its cigarette ruling, Congress would have expressly prohibited it, that possibility must remain in the realm of speculation." (App. B, p. 12a, n. 26.) The point is that the FCC knew that Congress was considering the question of regulating cigarette advertising; the FCC informed Congress that it did not believe it was the appropriate agency to deal with the matter; Congress adopted the "broad, across the board" regulatory approach suggested by the FCC; and as Commissioner Loevinger pointed out, "Congress was surely warranted in assuming that the FCC would not undertake to exercise its limited jurisdiction in a 'piecemeal' attack upon the problem." (App. A, p. 98.)

The FCC acknowledges in its decision that the Cigarette Act precludes it from requiring a cessation of cigarette advertising on the air, or from requiring a health warning "in or adjacent to" cigarette commercials, or from ordering licensees to afford anti-smoking advocates time "roughly approximate" to that devoted to cigarette commercials—even though none of these prohibitions is expressly stated in the Cigarette Act. (App. A, pp. 15-16, 49, 51). It is clear that all these limitations on the FCC's power—as well as a restriction on the asserted power to require licensees to accord a "significant amount of time" to anti-smoking advocates—are required in order to effectuate the purposes of the Act.

The Court of Appeals justified its admittedly restrictive reading of the Cigarette Act on the ground that Congress did not intend to impede the flow of information to the public concerning the hazards of smoking. No one has argued that there was any such intent. The point is that there is no proof that Congress intended that regulatory agencies should be free to *compel* various parties to disseminate such information; the legislative history is to the contrary.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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SUPREME COURT, U. S.

No. 48 [redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

NATIONAL ASSOCIATION OF BROADCASTERS
and
WTRF-TV, INC., *Petitioners,*
v.
FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ____

NATIONAL ASSOCIATION OF BROADCASTERS

and

WTRF-TV, INC., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Association of Broadcasters and WTRF-TV, Inc., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 21, 1968.

OPINIONS BELOW

The opinion of the court of appeals, which is not yet reported, appears at App. B, pp. 1a-40a.[1] The ruling of the Federal Communications Commission of June 2, 1967, reported at 8 F.C.C. 2d 381, appears at App. A, pp. 14-17, and the FCC's Memorandum Opinion and Order, released September 13, 1967, and reported at 9 F.C.C. 2d 921, appears at App. A, pp. 37-105.

JURISDICTION

The judgment of the court of appeals (App. B, pp. 41a-43a) was entered on November 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an FCC ruling that broadcasters of cigarette commercials must broadcast on a regular basis material presenting the viewpoint that cigarette smoking may be hazardous is within the FCC's authority under the Communications Act.

2. Whether the ruling, if authorized under the Communications Act, violates the First or Fifth Amendment.

3. Whether the ruling is precluded by reason of the Federal Cigarette Labeling and Advertising Act.

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[1] "App." references are to the pages of the separately bound volume which is an Appendix to this Petition, as well as to other Petitions filed with respect to the judgment of the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.*, and of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331 *et seq.*, appear at App. C, pp. 45a-49a.

STATEMENT OF THE CASE

The FCC ruling, affirmed by the court of appeals, requires each radio and television station which carries cigarette commercials to devote a significant amount of broadcast time, each week, to warnings of the asserted health hazard of cigarette smoking.

Proceedings before the FCC

The ruling was occasioned by a letter complaint filed with the FCC on January 5, 1967, by Mr. John F. Banzhaf, III, a resident of New York City, against television station WCBS-TV, an FCC licensee in New York City. (J.A. 2-5).[2] The complaint, to the effect

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[2] "J.A." references are to the pages of the Joint Appendix as printed for use by the court of appeals and included in the certified transcript of record.

that WCBS-TV had not fulfilled its asserted obligations under the FCC's Fairness Doctrine because it carried cigarette commercials and had not honored Mr. Banzhaf's request for free broadcast time, equal to that devoted to the commercials, to present contrasting views on the smoking and health issue, enclosed copies of correspondence between Mr. Banzhaf and WCBS-TV. (J.A. 5-13). WCBS-TV's position was that its coverage of the cigarette health issue had been both fair and objective and thus consistent with the Fairness Doctrine and that, in any event, that Doctrine was not a vehicle for FCC regulation of product advertising, a matter for which other agencies bore regulatory responsibility. (J.A. 13).

WCBS-TV was not notified of Mr. Banzhaf's letter to the FCC until June 2, 1967. On that date the FCC wrote the station, summarizing Mr. Banzhaf's letter to it, and informing the station that the Fairness Doctrine is applicable to cigarette commercials and that therefore "a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." Its letter stated that it rejected Mr. Banzhaf's claim to equal time but that "each week" the station should allocate "sufficient time" to "the viewpoint of the health hazard posed by smoking." (App. A, pp. 14-17).

The FCC's letter to WCBS-TV was publicly released, and thereafter these petitioners,[3] among many

[3] Petitioner National Association of Broadcasters is a nonprofit organization of radio and television broadcasters whose membership includes some 3900 radio and television stations and all the radio and television networks. Petitioner WTRF-TV, Inc., is an individual broadcaster licensee.

others, filed petitions for reconsideration of the letter ruling, in response to which the FCC issued its Memorandum Opinion and Order. (App. A, pp. 37-105). The FCC provided that the requirement announced in its June 2 letter would have only prospective operation and would be applicable to all broadcast stations. (App. A, pp. 40-41, 82). The specific facts relating to WCBS-TV thus became irrelevant.

In its Memorandum Opinion and Order, the FCC brushed aside the contentions made in the petitions for reconsideration that its ruling violated the First and Fifth Amendments. The FCC simply pointed to its rejection of similar arguments in its previous order adopting rules governing personal attacks and political editorializing[4] and to the court of appeals' rejection of these arguments in *Red Lion Broadcasting Co.* v. *FCC,* 127 U.S. App. D.C. 129, 381 F.2d 908 (1967),[5] and said that "we see no valid distinction in the circumstances of this matter." (App. A, pp. 42-43).

The FCC then went on to reject statutory arguments that the Fairness Doctrine does not apply to product advertising.[6] It concluded that, "in any event . . . we

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[4] These rules were subsequently invalidated, as contrary to the First Amendment, by the Court of Appeals for the Seventh Circuit. Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968). This Court has granted certiorari to review the Seventh Circuit's decision. 37 U.S.L.W. 3247 (Jan. 13, 1969).

[5] Certiorari was subsequently granted by this Court to review the *Red Lion* decision, 389 U.S. 968 (1967), and argument was postponed pending the Seventh Circuit's decision referred to in n. 4 *supra.* 390 U.S. 916 (1968).

[6] The Fairness Doctrine had been adopted by the FCC in a 1949 report, Editorializing by Broadcast Licensees, 13 F.C.C. 1246, in which it overruled a prior decision forbidding broadcaster advocacy of any side of any public issue (Mayflower Broadcasting Corp.,

think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time." (App. A, p. 48). The "specifics of the Fairness Doctrine" aside, said the FCC, the ruling is in the public interest. (App. A, p. 87).

It had also been argued that the FCC's ruling was precluded by reason of the "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health" established in the Federal Cigarette Labeling and Advertising Act (§ 2) and the moratorium in

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8 F.C.C. 333 (1941)) and determined that (1) every broadcaster has an affirmative obligation to devote significant portions of broadcast time to informing listeners on issues of public importance and (2) this obligation can be discharged only by the broadcaster's providing an opportunity for various sides of such issues to be presented to its listeners. The statutory basis for the Doctrine as adopted was the FCC's power to license stations—initially and for periodic renewals—if it determines that "the public interest, convenience, and necessity would be served" by a grant of the license. (Communications Act, §§ 307(d), 309(a), App. C, pp. 45a-46a). Subsequently, as a result of an FCC ruling in the *Lar Daly* case (CBS, Inc., 18 P & F Radio Reg. 238, *on reconsideration*, 26 F.C.C. 715 (1959)), Congress amended § 315 of the Act and added a sentence, which the FCC construes as a ratification of the Fairness Doctrine, referring to "the obligation imposed upon [licensees] . . . under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (App. C, pp. 46a-47a).

The ruling could not possibly be supported by the Fairness Doctrine unless it is concluded that *all* cigarette commercials constitute a "discussion" of "views on issues of public importance," a conclusion that anyone exposed to cigarette commercials would dispute. To speak of the usual advertising patter (or pretty pictures) as a "discussion" of such "views" warps words, especially when those words are read against the exposition of the Fairness Doctrine in the FCC's report adopting the Doctrine.

Section 5 of that Act with respect to warnings of the cigarette health hazard. (App. C, pp. 48a-49a). The FCC disposed of this argument by holding that the moratorium applies only to the requirement of health warnings "in" cigarette advertising; it deemed itself free, therefore, to require broadcasters to warn listeners of the asserted health hazard elsewhere in their programming than "in" the cigarette commercials themselves.[7]

The FCC went on to argue that since, in connection with its adoption of the Cigarette Labeling Act, Congress had indicated its desire to encourage the education of the public on the asserted health hazard, it is consistent with the Act to compel broadcasters of cigarette commercials to "implement" such an educational effort by application of the Fairness Doctrine to such commercials. (App. A, pp. 57-58).

The court of appeals' opinion

The FCC's ruling was affirmed by the United States Court of Appeals for the District of Columbia Circuit.[8]

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[7] Paradoxically, however, despite its reliance on the word "in," the FCC acknowledged that that Act prevents it from requiring that health warnings be "adjacent to" the cigarette commercials or that the same amount of time be given to such warnings as is devoted to cigarette commercials. (App. A, p. 57).

[8] These petitioners filed their petitions to review the FCC's orders in the United States Court of Appeals for the Fourth Circuit. That court's jurisdiction was based on § 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), § 2 of the Judicial Review Act of 1950, 28 U.S.C. § 2342, § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and 28 U.S.C. § 2112.

On December 18, 1967, that court, pursuant to 28 U.S.C. § 2112, transferred the cases to the court below where there was pending another petition to review these same orders. The court below had jurisdiction over the proceeding under the provisions cited in the preceding paragraph.

Chief Judge Bazelon, joined by Judge Wright, wrote the majority opinion; Judge Miller noted a dissent.

The court of appeals had considerably greater difficulty with the case than did the FCC. On the constitutional issues presented, the court observed that the Seventh Circuit's decision in *Radio Television News Directors Ass'n* (*see* n. 4 *supra*) holding the FCC's personal attack rules in violation of the First Amendment "has cast some doubt on the constitutionality of the underlying fairness doctrine" (App. B, p. 14a), an issue now to be resolved by this Court, and stated that "it may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (App. B, p. 32a). The court attributed "considerable force" to the argument that the First Amendment requires that "the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market." (App. B, p. 31a).

The argument, however, was rejected, and the court upheld the constitutionality of the ruling. The court relied on the following considerations: the ruling does not ban any speech; the speech that might be "chilled," product advertising, "barely qualifies as constitutionally protected 'speech' "; the danger that even this speech would be "chilled" is probably marginal; the First Amendment gain is greater than the loss because the ruling serves to "redress the balance" of power among those interested in the cigarette health issue; and the ruling results in the provision of information to the public. (App. B, pp. 34a-38a). On this basis the court upheld a ruling that could not withstand

scrutiny were the Government to attempt to apply it to newspaper or other advertising.

On the statutory question, too, the court below was troubled, giving no more than "cautious approval" to the FCC's ruling. (App. B, p. 30a). The court noted that the ruling was "to all intents a novel application" of the Fairness Doctrine (App. B, p. 15a), not supported by precedent: "[E]xcept for the personal attack rules struck down by the Seventh Circuit, we know of no case in which the Commission has so specifically defined the stations' duties under the fairness doctrine." (App. B, p. 16a). The court repeated: "[A]s an extension of the fairness doctrine it [the ruling] is an unusual limitation of the licensee's discretion." (App. B, p. 24a).

The court went on to hold that, under the Communications Act, the FCC has some authority to apply the "public interest" standard of the Act to programming (App. B, pp. 18a-24a) but observed that the Commission may not "scan the airwaves for offensive material with no more discriminating a lens than the 'public interest.'" (App. B, p. 30a). As the court stated: "Especially with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards." (App. B, p. 24a).

Then, although the FCC had done what the court said it could not do—impose the ruling simply because it was felt to be in the public interest—, the court affirmed the FCC on the ground that, "Whatever else it may mean . . . we think the public interest indisputably includes the public health" (App. B, p. 25a), and the ruling was supportable on a public health basis.

This narrowing by the court of the "public interest" standard was felt to remove much of its "vagueness and over-breadth," which made it inadequate to support action by the FCC in the programming area. (App. B, p. 26a).

As for the Cigarette Labeling Act argument, the court of appeals, on the basis of "a relatively narrow reading of the Act" (App. B, p. 13a), determined that the "comprehensive Federal program" established by that Act did not affect "the question of the public's need for information about the nature, extent, and certainty of the danger," and hence did not bar the FCC's ruling. (App. B, p. 11a). The court distinguished sharply between *warnings* as to the asserted cigarette hazard and *information* on that subject (App. B, pp. 11a-12a); only the former was precluded by the Act, according to the court, even though the Act's statement of policy draws no such distinction but speaks of informing the public by means of a warning. One purpose of the Act, Congress declared, was to establish a program whereby

> "the public may be adequately *informed* that cigarette smoking may be hazardous to health by inclusion of a *warning* to that effect on each package of cigarettes." (App. C, pp. 47a-48a).

The court of appeals nevertheless was of the view that there is a "need for an abundant and ready supply of relevant information" on the smoking and health issue (App. B, p. 10a) and that Congress did not intend to bar actions which coerce the supplying of such information.

REASONS FOR GRANTING THE WRIT

At issue in this case are questions of substantial importance as to the FCC's constitutional and statutory authority over the content of broadcast material. As indicated in the court of appeals' opinion, these questions are related to, but extend beyond, those now before this Court in No. 2 (*Red Lion Broadcasting Co.* v. *FCC, cert. granted,* 389 U.S. 968) and No. 717 (*United States* v. *Radio Television News Directors Ass'n, cert. granted,* 37 U.S.L.W. 3247 (Jan. 13, 1969)). This case, moreover, presents an additional issue—the extent of First Amendment protection of commercial advertising—not raised in those cases and which is of importance in many contexts other than that of the FCC's regulatory authority. In addition, there is here presented an issue as to the preemptive effect of the Federal Cigarette Labeling and Advertising Act, a major regulatory statute which has not previously been before this Court.

1. The FCC ruling is a directive to every broadcaster that it must carry specific programming—material asserting the health hazard of smoking—if it broadcasts certain other specific material—commercials urging the consumption of a particular cigarette brand. The sanction available for violation of this ruling is severe, nonrenewal of the broadcaster's license and the loss of its entire investment. The basis for the ruling is the FCC's belief that the public must be informed concerning the asserted cigarette health hazard and that it would be contrary to the "public interest" for a broadcaster carrying cigarette commercials not so to inform its listeners.

Can this directive or any directive to a broadcaster as to specific programming it must carry if it wishes to broadcast other material square with the no-censorship provision of the Communications Act[9] and the First Amendment? Contemporary understanding of the First Amendment as premised on the proposition that everyone with something to say is to be permitted to present his views freely and without restraint and that Government may not require one who would speak to pay a "price" for that right[10] clearly would preclude any such directive to newspapers. Are broadcasters distinguishable for First Amendment purposes? In *Radio Television News Directors Ass'n,* as the court below recognized (App. B, p. 31a), the Court of Appeals for the Seventh Circuit "declared that the historical distinction between press and broadcasting is untenable for First Amendment purposes"; the court below believed that, on the other hand, "there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment" (App. B, p. 32a); this Court, having recognized that communication by means of radio and television

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[9] Section 326 of the Act (App. C, p. 47a) provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[10] *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 150-51 (1967); Garrison v. Louisiana, 379 U.S. 64, 74 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 270-72 (1964); Talley v. California, 360 U.S. 60 (1960); Speiser v. Randall, 357 U.S. 513, 526 (1958).

enjoys the protection of the First Amendment,[11] must deal with this issue.

The underlying questions—whether the technical limitations on the number of broadcasting stations[12] and the nature and impact of broadcast transmissions justify discriminatory treatment of broadcasters; whether the broadcast "privilege" permits governmental restraints that could not be imposed on newspapers—are presented in *Red Lion* and *Radio Television News Directors Ass'n,* as well as in this case. The First Amendment problem in this case, however, is in a context that adds another factor that should be considered by this Court.

The FCC's actions in those cases are arguably supported by what the FCC believes to be the statutory codification of the Fairness Doctrine, and that alleged codification arguably provides a standard that permits a broadcaster to determine in advance what its obligation is in any particular circumstance and to test on judicial review the statutory validity of the FCC's ruling. Here, on the other hand, as the court of appeals found, it cannot seriously be contended that the FCC's ruling is supported by the Fairness Doctrine, and the only possible statutory basis for the ruling is the broad

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[11] United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Superior Films, Inc. v. Department of Education, 346 U.S. 587, 589 (1954) (concurring opinion); Estes v. Texas, 381 U.S. 532, 585, 589-90, 604, 615 (1965) (concurring and dissenting opinions).

[12] It is not without significance that these technical limitations have not prevented proliferation of broadcast outlets and the availability of unused frequencies. No longer are frequencies scarce; broadcasting stations are more numerous than the daily press. *See Radio Television News Directors Ass'n,* 400 F.2d at 1018-19.

and unspecific "public interest" standard applicable to FCC licensing of broadcasters.

This lack of any preexisting, readily ascertainable criteria governing permissible FCC action as to broadcast content means that broadcasters are compelled to guess as to what the FCC's views may be of the "public interest" and to comply even with hints from the FCC, given in such places as speeches by FCC members.[13] The relevance for First Amendment purposes is that this lack of a standard, coupled with the FCC's life-or-death power over a broadcaster's enterprise, leads to the very kind of Government-imposed self-censorship that this Court has held to be a vice of governmental intrusion into the sensitive First Amendment area.[14] Whether the FCC nevertheless, consistently with the First Amendment, may regulate broadcast content under a "public interest" standard should be determined by this Court.

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[13] The success of this technique of regulation by means of the lifted eyebrow (*see* Miami Broadcasting Co. (WQAM), 14 P & F Radio Reg. 125, 128 (1956) (Commissioner Doerfer dissenting); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 118-21 (1967)) is made possible by the fact that broadcast licenses can be issued or renewed for a period of no more than 3 years. (Communications Act, § 307(d), App. C. p. 45a). Every broadcaster knows that to be independent of the views, or even the hints, that emanate from the FCC is to court its displeasure when the broadcaster's license is up for renewal and to risk nonrenewal of license, a risk that no broadcaster can afford.

[14] Whitehill v. Elkins, 389 U.S. 54, 59-62 (1967); Ashton v. Kentucky, 384 U.S. 195, 200-01 (1966); NAACP v. Button, 371 U.S. 415, 432-33 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278, 287-88 (1961); Smith v. California, 361 U.S. 147, 150-52 (1959).

2. The lack of any meaningful statutory standard also presents a serious Fifth Amendment issue. The FCC in this case regarded itself as bound only by a limitless "public interest." The court of appeals determined that that standard is too vague to support any FCC supervision over broadcast content, a determination that is quite clearly correct. *See Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *United States* v. *Robel*, 389 U.S. 258, 269-77 (1967) (Brennan, J., concurring); *Arizona* v. *California*, 373 U.S. 546, 603, 624-27 (1963) (Harlan, J., dissenting). The court thus felt the need to narrow the "public interest" standard, believed that it was doing so by stating that "the public interest indisputably includes the public health" (App. B, p. 25a), and on this basis affirmed the FCC's ruling. This approach, however, is not adequate to cure the "vagueness and over-breadth" inherent in the "public interest" standard. (App. B, p. 26a).

In order for the court's purported narrowing of that standard to be at all meaningful, the court would have to set a coherent limit on what the FCC could do under the "public interest" standard, to be applicable when the next case comes up. The court's opinion does not, however, set such a limit because the court did *not* say that, in the area of broadcast content, the permissible extent of FCC regulation is limited to the public health component of the "public interest." Thus the FCC would not be prevented from seeking to justify its next programming ruling on some other asserted "public interest" rationale, and the problems that the lack of a meaningful standard create are still present despite the court of appeals' purported narrowing of the "public interest" standard.

It might be that the "public interest" would have the needed specificity were it to import considerations unique to or especially related to the conditions of broadcasting.[15] Or it might suffice were the "public interest" to import accepted criteria applicable to all advertising media.[16] But the court of appeals did not so base its public health rationale. Rather it plucked the rationale out of thin air; it was nothing more than a *post hoc* rationalization of the FCC's ruling. This will not do.

The consequences are startling. Already the FCC has proposed to bar all cigarette advertising by radio or TV on the ground that this would be a public health measure.[17] Even if Congress otherwise permits—or refuses to prohibit—cigarette advertising, the FCC proposes that the "public interest" standard in its Act permits it to impose a broadcasting bar if it deems that to be in the interest of the public health.

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[15] The "public interest" has been held to be an adequate vehicle for the exercise of delegated authority where the "standard to guide determinations" under that phrase arises from the nature of the area that is to be regulated, *see, e.g.*, N.Y. Central Securities Co. v. United States, 287 U.S. 12, 24-25 (1932), and on this basis the Court has upheld FCC licensing authority under the "public interest" standard. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940); *see* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953); National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943).

[16] In the context of this case, since the basis for the FCC's ruling was its concern over the impact of cigarette advertising, that more precise standard would be the prohibition in § 5 of the Federal Trade Commission Act of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . . ." 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45.

[17] Notice of Proposed Rule Making, FCC Dkt. 18434, 34 Fed. Reg. 1959 (Feb. 11, 1969).

This Court's review is called for before the mere words, "public interest," in the Communications Act can be permitted to convey on the FCC such power to legislate.

3. In upholding the constitutionality of the FCC's ruling, the court of appeals decided that the First Amendment provides less protection to commercial advertising than to other forms of expression. The court rested this decision on *Valentine* v. *Chrestensen,* 316 U.S. 52 (1943).[18] We submit that this Court should reexamine the force of that old precedent.

Valentine involved a New York City ordinance prohibiting distribution in the streets of commercial and business advertising matter; material devoted solely to "information or a public protest" was excepted. *See* 316 U.S. at 53. This Court perfunctorily rejected the argument that the ordinance could not constitutionally be applied to handbills which, on one side, advertised respondent's submarine and, on the other, protested the city's refusal to provide respondent with wharfage facilities. The Court recognized that the "freedom of communicating information and disseminating opinion" may not be unduly burdened by Government, but stated that "the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U.S. at 54. The Court had no difficulty in that case in "apportioning . . . the contents of the communication as between what is

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[18] The other cases relied on by the court of appeals, the last of which, other than Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963), was decided in 1951, do not deal with product advertising, although they cover analogous situations. In *Head,* as the court of appeals observed, this Court did not reach the First Amendment question. (App. B, p. 35a).

of public interest and what is for private profit" because it was clear that respondent's coupling of the protest with his advertisement was for the purpose of evading the prohibition of the ordinance. 316 U.S. at 55.

Recent decisions of this Court indicate that *Valentine* must be reexamined. In *Cammarano* v. *United States,* 358 U.S. 498 (1959), Mr. Justice Douglas, in a concurring opinion, referring to the *Valentine* ruling as "casual, almost offhand," stated that it "has not survived reflection." 358 U.S. at 514. Mr. Justice Douglas observed that "the profit motive should make no difference" for First Amendment purposes, and that it was difficult to draw a line between "those who make their living through exercise of First Amendment rights" and those who "advertise their wares." *Ibid.*

The Court has since stressed that the commercial motive of an author or publisher does not deprive his material of constitutional protection. *See, e.g., Smith* v. *California,* 361 U.S. 147, 150 (1959). The Court has also held that the fact that statements of opinion and recitations of grievances appear in a paid newspaper advertisement is immaterial from a First Amendment standpoint. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964). Clearly, these holdings as to the irrelevance of the profit motive in First Amendment terms have undercut the *Valentine* rationale.

Moreover, this case, which treats cigarette commercials as both an expression of a view on a matter of public concern and as a message urging the consumption of a particular product, demonstrates that the dis-

tinction drawn in *Valentine* between "purely commercial advertising" and "information and . . . opinion" is neither valid nor easily applied in many situations. For the fact is that there is public controversy surrounding many heavily advertised commodities—drugs, automobiles, airplane travel, beer and wine, to name a few—and advertisements for these products and services may convey information and express opinions while at the same time urging purchase of the particular product advertised.

Valentine should be reexamined and not stand as a bar to First Amendment protection of truthful product advertising.[19]

4. Also at issue in this case is the scope of the preemptive effect of the Federal Cigarette Labeling and Advertising Act and whether the court of appeals, in construing that statute, applied its own notions of what would be sound legislative policy instead of fairly attempting to ascertain and apply the policy expressed by Congress.

That Act, adopted after extensive congressional consideration of the complexities and implications of the cigarette health issue and its relation to cigarette advertising,[20] states its purpose and Congress' policy to

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[19] It is not disputed that "there is no constitutional right to disseminate false or misleading advertisements." *E.g.*, Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962).

[20] *See* Hearings on Cigarette Labeling and Advertising Before the House Interstate and Foreign Commerce Committee, 88th Cong., 2d Sess. (1964); Hearings on Cigarette Labeling and Advertising Before the Senate Commerce Committee, 89th Cong., 1st Sess. (1965); Hearings on Cigarette Labeling and Advertising Before the House Interstate and Foreign Commerce Committee, 89th Cong., 1st Sess. (1965).

be "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health . . . ." § 2. (App. C, p. 47a). This "comprehensive Federal program" represents on its face a balancing by Congress of two necessarily conflicting objectives.

One objective, according to Section 2(1) (App. C, pp. 47a-48a), is that "the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes . . . ." Section 4 of the Act requires a warning—"Caution: Cigarette Smoking May Be Hazardous to Your Health"—to appear conspicuously on every cigarette package. (App. C, p. 48a).

The second major objective is also spelled out in the Act. § 2(2). (App. C, p. 48a). It is that

> "commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy [of adequately informing the public by the warning on the package] and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

Section 5(a) of the Act bars any requirement that cigarette packages bear any warning statement other than that prescribed by Section 4, and Section 5(b) provides:

> "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (App. C, p. 48a).

It is clear that Congress intended these "preemption" provisions to apply to "all Federal, State, and local authorities. . . ." S. Rep. No. 195, 89th Cong., 1st Sess. 6 (1965); H.R. Rep. No. 449, 89th Cong., 1st Sess. 5 (1965).

The court of appeals held that the Act did not preclude the FCC ruling. It determined that the Act's "'comprehensive program' was directed at the relatively narrow specific issue of regulation of 'cigarette labeling and advertising'" (App. B, p. 10a), stating that the Act was passed in response to an FTC rule requiring advertising warnings and that "nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation by other agencies." (App. B, p. 11a).

This conclusion, however, overlooks the fact that when Congress was considering the cigarette health controversy the views of all Federal agencies were canvassed. The FCC's response was that cigarette advertising on radio and television should not be handled on a special basis but only as part of an across-the-board treatment of cigarette advertising in all media and that it was proposing no special action on its own. *See, e.g.*, S. Rep. No. 195, *supra*, at 13-14. Given this response, it is not surprising that neither the FCC nor its ruling was expressly mentioned in the statute. Congress could hardly have been expected to address itself in terms to the FCC's current action when the FCC had led Congress to believe that it contemplated no action.

Nor does the court of appeals persuasively support its conclusion by describing the preemptive "comprehensive program" as one dealing only with the "regulation of cigarette labeling and advertising." (App.

B, p. 10a). Admittedly, the requirement of a warning in or adjacent to cigarette advertising is barred by the "comprehensive program" since it would be a regulation of advertising. But no less is it a regulation of advertising to require statements in connection with such advertising. Moreover, the Act refers to its "comprehensive program" as one *"to deal with* cigarette labeling and advertising." (App. C, p. 47a). Certainly even if it were possible to hold that the FTC ruling is not a "regulation" of cigarette advertising, it cannot be suggested that it does not "deal with" such advertising.

The court of appeals, however, believed that there is a need not only for warnings as to the asserted health hazard of smoking but also for information on this subject and construed the statute as related only to warning requirements. But this distinction between warnings and information is not reflected in the Act. Moreover, the distinction is directly inconsistent with the Act's stated purpose (§ 2, App. C, pp. 47a-48a) to establish a program whereby "the public may be *adequately informed* that cigarette smoking may be hazardous to health by inclusion of a *warning* to that effect on each package of cigarettes . . . ." (Emphasis added).

Of course, the public may well need more information on smoking and health and, as the court pointed out (App. B, p. 9a), the legislative history of the statute refers to smoking education campaigns by both public and private groups and to congressional appropriations for Federal informational activities. The issue here, however, is whether the supplying of this information can be compelled by Government in connection with the broadcast of cigarette advertising. On this point, the policy of Congress is clearly expressed in the

Cigarette Labeling Act; that policy is that the package warning requirement should be the extent of Government compulsion allowable to assure that "the public may be adequately informed."

In addition, Congress indicated its intent to "re-examine the subject matter covered by" the legislation prior to July 1, 1969 (H.R. Rep. No. 586, 89th Cong., 1st Sess. 6 (1965)), the termination date specified in Section 10 for the provisions of the Act "which affect the regulation of advertising." (App. C, p. 49a). Congress did not want an administrative agency to affect the regulation of advertising prior to that date without express congressional authorization. The court erred in not restraining the FCC and in permitting it to assume a major regulatory role in an area in which Congress enacted a "comprehensive program" with no provision for any FCC responsibility.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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OPINIONS BELOW

The opinion of the Court of Appeals (App. B, pp. 1a-40a)[1] is not yet reported. The letter ruling of the Federal Communications Commission dated June 2, 1967 (App. A, pp. 14-17) is reported at 8 F.C.C. 2d 381, and its Memorandum Opinion and Order on reconsideration, adopted September 8, 1967 (App. A, pp. 37-105), is reported at 9 F.C.C. 2d 921.

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[1] "App." refers to the separately bound Appendix to this petition and the petitions in three related cases, forty copies of which have been filed with the Clerk of this Court. "J.A." refers to the printed Joint Appendix in the court below, also duly certified to this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1968 (App. B, pp. 41a-43a). Petitioner American Broadcasting Companies, Inc., as a broadcast licensee and the operator of nationwide radio and television networks, participated as a "party in interest" in the proceedings before the Federal Communications Commission and as an "intervenor" in the court below (28 U.S.C. Sec. 2348). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 28 U.S.C. Sec. 2348.

QUESTIONS PRESENTED

1. Whether action by the Federal Communications Commission ordering radio and television stations that carry routine product advertisements for cigarettes[1] to devote a "significant amount" of broadcast time "each week" to warning the public of the hazards of cigarette smoking impinges upon the free speech guarantees of the First Amendment, and the no censorship prohibitions of Section 326 of the Communications Act—in situations where the Commission, in taking the action it did, can point to no statutory standard more specific or substantive than "public interest, convenience, and necessity."

2. Whether the Commission's ruling is in conflict with the pre-emption provisions of the Federal Cigarette Labeling and Advertising Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First and Fifth Amendments to the United States Constitution provide in pertinent part:

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[1] Any cigarette advertisements which make any claims with respect to health are forbidden by the manufacturers' own advertising code and by the FTC Cigarette Advertising Guides (see H.R. Rep. No. 449, 89th Cong. 1st Sess., p. 5 (1965)).

"Congress shall make no law . . . abriding the freedom of speech, or of the press . . .

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

2. Pertinent statutory provisions are set forth in Appendix C, pp. 45a-49a.

STATEMENT

After a turndown by television station WCBS-TV, New York, N.Y. of his demand for free time, "roughly in proportion" to the time devoted by the station to cigarette commercials, in which to discuss the hazards of smoking (J.A. 6, 7, 9), John F. Banzhaf, III, filed a complaint with the Federal Communications Commission ("Commission"), alleging such refusal contravened the Commission's "Fairness Doctrine" (J.A. 2-5). Acting solely on data supplied by Banzhaf, the Commission sustained his complaint, in a letter of June 2, 1967 to WCBS-TV, which stated in pertinent part (App. A, p. 15):

> "We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. . . . We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."

From this action taken without prior notice, the National Association of Broadcasters, each of the major networks, and numerous other interested groups sought "rehearing" under 47 U.S.C. Sec. 405—contending that the "fairness doctrine" was not applicable to product advertising, and that the June 2 pronouncement contravened not only the First and Fifth Amendments, but also the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282-284, 15 U.S.C. Secs. 1331-39 (1965). These contentions were rejected by the Commission in a lengthy

Memorandum Opinion and Order adopted September 8, 1967 (App. A, pp. 37-105), a copy of which the Commission mailed to each of its more than 6000 broadcast licensees (App. A, pp. 41, 88), warning them that subsequent non-compliance with the action there taken "will receive consideration, in specific rulings where appropriate or at license renewal time" (App. A, p. 41).[1]

Upon review by the Court of Appeals for the District of Columbia Circuit, under 47 U.S.C. Sec. 402(a) and 28 U.S.C. Sec. 2342, the Commission's ruling was sustained by a divided court (per Bazelon and Wright, JJ., with Miller, J. dissenting without opinion).

On the premise that the health warnings which licensees are required to broadcast need not be inserted *in* the cigarette advertisements themselves, the court held that the Commission ruling did not "violate the letter" of the Cigarette Labeling Act nor conflict with the Congressional intent to protect cigarette manufacturers against conflicting requirements as to the content of cigarette advertising (App. B, pp. 7a, 13a).

Although recognizing, in First Amendment situations, that the "public interest" standard set forth in the Communications Act (e.g. 47 U.S.C. Sec. 307(a)) is too vague a standard with which to sustain administrative regulation of program *content* (App. A, p. 24a), the court held that " 'public interest' indisputably includes the public 'health' ", and that the Commission may invoke this more specific standard to regulate the content of broadcasting (App. B, p. 25a)—with product advertising not entitled to the same degree of protection as other forms of speech, and with the broadcast media accorded lesser protection than printed media (App. B, pp. 30a-38a). It is those holdings which petitioner requests this Court to review.

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[1] See Attachment I to the instant petition.

REASONS FOR GRANTING THE WRIT

I

A. In requiring radio and television stations that carry cigarette advertising to devote a "significant amount of time each week" to discussing the health hazards of smoking, the Commission was able to point to no statutory standard more specific or substantive than the "public interest, convenience, and necessity", the standard prescribed in the Communications Act for granting and renewing broadcast licenses (47 U.S.C. Sec. 307(a) and (d)).

As repeatedly stated by this Court, although the touchstone of "public interest, convenience and necessity" and other correspondingly broad standards may be specific enough in some contexts, they lack sufficient specificity where government agencies by such portmanteau words seek to regulate evils intertwined with First Amendment freedoms. *Staub* v. *Baxley*, 355 U.S. 313; *Butler* v. *Michigan*, 352 U.S. 380, 383; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502.

It cannot be gainsaid that where administrative agencies in the exercise of their licensing and other statutory functions, "judge the content of the words and pictures sought to be communicated," Congress must first have spoken "with narrow specificity". *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503; *Smith* v. *California*, 361 U.S. 147, 150-151; *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146. A violation of the First Amendment occurs where a government agency "undertakes to censor the contents of the broadcasting". *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (Jackson, J. concurring). "The term censorship . . . connotes *any* examination of thought or expression in order to prevent publication of 'objectionable material'." *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 527 (emphasis by the Court). The action here challenged is only the first step to an absolute ban on the carriage ("publication") of cigarette com-

mercials, as evidenced by precisely such a rule-making proposal instituted by the Commission on February 5, 1969 (F.C.C. Docket No. 18434).

In short, where the Commission (as here) attempts to prescribe conditions under which cigarettes (a product lawfully sold in interstate commerce) may be advertised over the air, under a statutory standard no more specific or substantive than the "public interest", it impinges on the free speech guarantees of the First Amendment and the no censorship prohibitions expressly inserted by Congress in the basic statute under which the Commission functions (47 U.S.C. Sec. 326).

Unlike the Commission which was content to premise its authority solely on the "public interest" concept, the court below squarely ruled that this vague standard was insufficient to sustain the "unusual limitations" here placed on a licensee's discretion (App. B, pp. 18a, 24a-25a). However, to rewrite "public interest" to read "public health" and then in turn to restrict "public health" to "a unique situation" like cigarette advertising, as the court below did, is to exercise powers which the Constitution has entrusted to Congress and not to the Judiciary. *Securities and Exchange Com.* v. *Chenery Corp.*, 332 U.S. 194, 196; see also *Border Pipe Line Co.* v. *Federal Power Commission*, 171 F.2d 149 (App. D.C. 1948).

To suggest, as did the court below and as the Commission repeatedly does, that the protection which the First Amendment accords printed media differs from the protection accorded broadcast media presents a question of general importance which should at long last be considered and clarified by this Court. See Sullivan, "Editorials and Controversy: The Broadcaster's Dilemma", 32 *Geo. Wash. Law Rev.* 719, 721 (1964); Note, "Regulation of Program Content by the F.C.C.", 77 *Harv. Law Rev.* 701 (1964); Robinson, "The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation," 52

Minn. Law Rev. 67 (1967). As the Commission has heretofore been warned by this Court in another context, where a grant of power is "accompanied by no substantive standard other than the 'public interest, convenience, and necessity' ", it is not to be lightly inferred that Congress thereby conferred on the Commission paramount control over "advertising content". *Head* v. *New Mexico Bd.*, 374 U.S. 424.[1]

As seemingly recognized by the court below, the First Amendment would clearly preclude a governmental agency from requiring printed media, even those claiming second-class mailing privileges, to set aside space each week for health hazard warnings in the event they carry cigarette advertising (App. A, pp. 30a-38a). *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146; cf. *Radio Television News Directors Assn.* v. *United States*, 400 F.2d 1002 (7th Cir. 1968), cert. granted No. 717, Jan. 13, 1969. Whether broadcast media have lesser protection is a highly important matter which this Court should resolve.

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[1] This is not to say, in program areas where Congress has already legistered with requisite specificity and where the Commission proceeds under those specific standards, and not (as here) under the general touchstone of "public interest", that the Commission may not look at programming or even at program content not within the ambit of the First Amendment's protection. For example, in 47 U.S.C. Sec. 312, Congress has expressly authorized the Commission to revoke licenses for broadcasting of "obscenity", "lotteries", and "fraud by radio", and to issue cease and desist orders against any licensee who has violated or failed to observe those criminal provisions, with a further right to revoke a license for any subsequent violation of a final cease and desist order issued in connection therewith. Elsewhere in the Act (47 U.S.C. Secs. 315 and 317), Congress has laid down explicit "equal time" requirements concerning "political broadcasts", and made sponsorship identification announcements mandatory. If the Commission were to examine into programming and revoke a license under those explicit provisions of the Act, it would be proceeding under specific statutory provisions which Congress has enacted covering those particular matters, and not under a broad "public interest" standard which this Court has indicated lacks sufficient specificity where First Amendment rights are involved.

B. No doubt aware that it was on slippery ground in extending its "fairness doctrine" to routine product advertising, the Commission stressed that its holding was limited to a single product—cigarettes (App. A, p. 15). In substituting a "public health" for a "public interest" test (App. A, p. 25), the court below likewise admitted that the Commission could not interdict "every broadcast which might . . . be thought to pose some danger to the public health." (App. A, pp. 26a, 27a, n. 63, 30a). Nowhere has the Commission or the court below adequately explained why, if the instant ruling is valid, like requirements could not be extended to dairy products (cholesterol), fluorides, beer, wine, vitamins, and insecticides—when mentioned on radio and television but not when advertised in the printed media. To single out cigarettes for unique treatment, different from all other product advertising, is a clear abuse of agency power, in derogation of the Fifth Amendment.

II

Only by an admittedly narrow reading of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. Secs. 1331-39, was the court below able to conclude that the Commission's ruling here complained of was not in patent conflict with the language, aims, and purpose of that statute. Following the Surgeon General's report in 1964, because of the vast conflicting interests involved, Congress preempted the field of cigarette advertising by the aforesaid statute until 1969. It first prescribed the precise cautionary warning to be carried on every cigarette package. The 1965 Act then went on to provide that, prior to July 1, 1969, "No statement relating to smoking or health shall be required in the advertising of any cigarettes, the package of which are labelled in conformity with the provisions of this Act." 15 U.S.C. Sec. 1334(b). The Commission ruling here challenged orders the broadcaster to do precisely what that Act said should not be required until July 1, 1969. The instant proceed-

ing is the first case to test the meaning of the pre-emption provisions of the Federal Cigarette Labeling and Advertising Act. The mere fact that this statute is due to expire by its own terms on July 1, 1969 does not render a ruling by this Court on its scope and purpose any less needed—as borne out by numerous unresolved cigarette smoking and health hazard complaints presently pending before the Commission, and with thousands of license renewals yet to be submitted justifying their operations over all or a portion of the 1966-1969 period. See Attachment I.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 18, 1969

ATTACHMENT I

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

February 12, 1969

FCC 69-122 25870
In Reply Refer to: 8330

Time-Life Broadcasting, Inc.
Station WFBM-AM-FM-TV
1330 N. Merdian
Indianapolis, Indiana 46202

Gentlemen:

This refers to the complaint of Mr. John F. Banzhaff III, submitted on October 23, 1968, and supplemented by letter of October 30, 1968, alleging that Stations WFBM-AM-FM-TV have failed to comply with the fairness doctrine.

Mr. Banzhaf states that in two editorials (copies of which are attached) broadcast a combined total of 20 times, the stations defended their right to present cigarette advertisements; that they opposed a recommendation of the Federal Trade Commission that all cigarette advertising be prohibited on radio and television; that they failed to present the other side of the issue; and that when he complained to you, he was told that the Federal Trade Commission's position had been presented in the stations' newscasts and that the editorials represented your disagreement with that position. Mr. Banzhaf claims that this argument "would make the entire fairness doctrine a farce" since "one side cannot be expected to present the arguments in support of his opponent's position," and that the Commission should take action against you on the ground that you failed to comply with the fairness doctrine and that you placed your financial interest in cigarette advertising above the rights of the people.

In your response to the complaint, filed November 21, 1968, you state that the editorials were broadcast after you broadcast a number of news items reporting the FTC's recommendation and quoting statements in support of such recommendation from Senator Magnuson and HEW Secretary Cohen; that in the editorials you attempted to present a view "which was partially critical" of the views expressed in the news broadcasts; that the editorials presented the view that if cigarette advertising were to be banned, it should be banned in all media and not solely radio and television; that if Congress feels cigarette smoking is a hazard to society, it would be more logical to ban the manufacture, sale, and possession of cigarettes than "to make radio and television the whipping boys"; and that the attack on cigarette advertising appears to be "only one of numerous manifestations of an anti-advertising sentiment on the part of many government departments." You state that since you presented the FTC's views on banning cigarette commercials in your news programs, you were entitled to express your disagreement with these views and that the presentation of contrasting views met the test of the fairness doctrine. You add that the editorials made it clear to the public that you had "some private interest" on the question of banning cigarette commercials; contend that you made an honest and reasonable effort to comply with the fairness doctrine; and cite your record of presenting anti-smoking announcements and numerous programs relating to health and smoking during the period August 1967 to October 1968.

There is of course no question as to your right to editorialize in any fashion and as vigorously as you choose on any issue. *Letter to Storer Broadcasting Company*, 11 FCC 2d 678 (1968). The question is rather whether, having done so, you have afforded reasonable opportunity for the presentation of conflicting viewpoints on that issue. In resolving that question, the Commission looks to all broadcast material cited by the licensee, and has further

noted that the licensee has considerable discretion in the manner of achieving fairness, with the Commission's role limited to determining whether the licensee's actions have been reasonable. Letter to *Lawrence M. C. Smith*, 40 FCC 549 (1963).

In the context of this case, the matter thus turns on whether you afforded reasonable opportunity for the presentation of contrasting viewpoints on the issue whether cigarette commercials should be banned. You have cited in this respect the numerous announcements carried by the station pointing up the health hazard in smoking, the news items reporting the FTC's recommendation and quoting statements of support, and the information in the editorials themselves, such as the statement that ". . . the Department of Health, Education and Welfare in a recent report said that a man between the ages of 25 and 35 who smokes more than two packages of cigarettes a day can expect to have his life shortened by 8 years. Even a light smoker can expect to lose 4 years of life". However, the delineation of the health hazard in smoking, while of course pertinent to the issue of banning cigarette commercials, does not constitute an adequate presentation of the contrasting viewpoint on that issue. Indeed, the health hazard aspect, as your editorials in effect state, is only the point of departure in determining what remedial action is appropriate. You have stated why banning cigarette commercials is not appropriate remedial action (see, e.g., attached editorial of July 15, 1968), but nowhere have you shown a presentation of the opposing side of that issue. The news items referred to basically recite the FTC recommendation (without exposition of the reasons given by the Commissioners who supported the recommendations—one TV news item recites some background data on cigarette commercials and expenditures), the statement by Senator Magnuson that his Committee would give the proposal "serious consideration," and statements of Secretary Cohen concerning the need for stronger health warnings on cigarette packages and in cigarette advertising. This

again cannot be said to be an adequate presentation of the contrasting viewpoint on the issue of whether the banning of cigarette commercials on radio and televison would be a sound step.

The Commission appreciates that you have acted in good faith in this matter, and, particularly, that you believed that by presenting the information as to the health hazard and the news items you had complied with the requirements of the fairness doctrine. However, recognizing fully the discretion afforded you on this area, we cannot find that you achieved fairness on the basis of the showing before us. The choice of how to do so—whether to present further material yourself, to select appropriate programming or an appropriate spokesman, etc.—is one for your good faith, reasonable judgment. It is requested that you notify the Commission as to the steps taken to achieve compliance with the requirements of the fairness doctrine in this instance.

Commissioner Bartley absent; Commissioner Johnson concurred in the result.

By Direction of the Commission.

BEN F. WAPLE
Secretary

Attachments
cc: John F. Banzhaf, III

Editorial

THE WFBM STATIONS

Time-Life Broadcast Inc. - 1330 N. Meridian St.
Indianapolis, Indiana 46202 - 635-9326

July 15, 1968

"CIGARETTE ADVERTISING #1"

Do radio and television commercials cause lung cancer?

Not likely. But the Federal Trade Commission, by a 3-to-2 vote, has recommended that Congress ban all cigarette advertising on radio and television. So you might *think* the commercials are at fault.

Actually, however, cigarettes are the health hazard. The Department of Health, Education and Welfare in a recent report said that a man between the ages of 25 and 35 who smokes more than two packages of cigarettes a day can expect to have his life shortened by 8 years. Even a light smoker can expect to lose 4 years of life.

This being a fact, then, the government should warn people of the hazards of cigarette smoking. And this it and a number of private agencies, such as the American Cancer Society, are doing.

But if Congress feels that the hazard to society is so great it can't stop there, then it would seem logical to ban the manufacture, sale and possession of cigarettes.

We see *no* logic at all in the Federal government subsidizing the tobacco farmers and permitting the manufacture and sale of cigarettes, then turning around and banning cigarette advertising—and not even *all* cigarette advertising at that, only cigarette advertising on radio and television.

The implication of the Federal Trade Commission proposal would seem to be that either radio and television commercials are more deadly than cigarettes, or that without radio and television advertising of cigarettes, so few people would buy them that the health hazard wouldn't matter. We don't believe either idea makes much sense.

The F.T.C. proposal evades the *real* issue—what should be done about cigarettes. And for Congress to adopt such a policy without banning cigarette advertising in *all* media and without also cracking down on the tobacco industry would be both discrimination and gross hypocrisy.

Editorial Times:

TV-Channel 6: 6:15 P.M.; 10:15 P.M. (Weekdays)

AM-Radio-1260: 6:10 P.M.; 9:07 P.M.; 6:05 A.M.; 1:07 P.M.; 3:07 P.M. (Weekdays) On Saturdays: 6:05 A.M.; 12:05 P.M.

FM-Radio-94.7: 5:05 P.M.; 10:05 P.M.; 11:15 A.M. (Weekdays) On Saturdays: 11:15 A.M.

Editorial

THE WFBM STATIONS

Time-Life Broadcast Inc. - 1330 N. Meridian St.
Indianapolis, Indiana 46202 - 635-9326

July 16, 1968

"CIGARETTE ADVERTISING #2"

To us at WFBM, the most frightening thing about the Federal Trade Commission proposal that cigarette advertising be banned from radio and television is *not* the threatened loss of revenue, or even the obvious discrimination against our industry. Rather, it is the *anti*-advertising sentiment reflected in that proposal.

Cigarette smoking may be hazardous to health. But people smoked cigarettes long before there were such things as radio and television. And if it took radio and TV advertising to sell a product today, the liquor industry in this country would be just about out of business. Broadcasters agreed *voluntarily* long ago not to carry liquor advertising. And to this day, most of them don't.

Cigarette advertising on our stations has dropped considerably in recent years. And as it has fallen off, other advertisers have always bought up the available time. We feel this would continue to be the case if all cigarette advertising was taken off.

But we believe advertising is an essential part of our free-choice economy. It tells consumers where to find the products and services they seek. It provides information on new products and services. And, to get even more basic, it encourages people to buy, which stimulates business, which is then able to provide more jobs, which in turn gives more people more money with which to buy the things they want and pay taxes.

The F.T.C. proposal to ban cigarette advertising on radio and TV is only one of many recent attacks on advertising. One official of the Justice Department has suggested that advertising be limited as an anti-trust remedy. And advertising seems to be under constant fire anymore from consumer groups inside and outside the government.

We don't claim commercial advertising is free from abuses. But many of the services it provides are essential to our economy and our free society. Without advertising, only the federal government would have the resources to provide those services. And that means more taxation.

Even in the Soviet Union, a country where the government has tried to do this job, the Moscow leadership is now encouraging the use of American advertising techniques and introducing other sales incentives seeking to improve the national output.

Editorial Times:

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AM-Radio-1260: 6:10 P.M.; 9:07 P.M.; 6:05 A.M.; 1:07 P.M.; 3:07 P.M. (Weekdays) On Saturdays: 6:05 A.M.; 12:05 P.M.

FM-Radio-94.7: 5:05 P.M.; 10:05 P.M.; 11:15 A.M. (Weekdays)

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No. [redacted] 51

NATIONAL BROADCASTING COMPANY, INC.,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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February 18, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

National Broadcasting Company, Inc. (hereinafter referred to as "NBC") petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the District of Columbia on November 21, 1968. The judgment of the Court of Appeals affirmed, 2 to 1, a ruling of the Federal Communications Commission that radio and television stations that broadcast cigarette commercials must provide a significant amount of broadcast time on a regular weekly basis consisting of material presenting the viewpoint that cigarette smoking may be a hazard to the smoker's health.[1]

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[1] The Federal Communications Commission is hereinafter referred to as the "FCC" and the "Commission".

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is printed as Appendix B to the Petitions for Certiorari.[2]

The initial ruling of the FCC, which was set forth in a letter opinion from the Commission to Television Station WCBS-TV is reported at 8 F.C.C.2d 381 (1967), and is printed at pages 14-17 of Appendix A to the Petitions for Certiorari.

The Memorandum Opinion and Order of the FCC entitled "Applicability of The Fairness Doctrine to Cigarette Advertising", which reaffirms its initial ruling, is reported at 9 F.C.C.2d 921 (1967), and is printed at pages 37-105 of Appendix A to the Petitions for Certiorari.

A clarifying ruling of the FCC with respect to its Order and Memorandum Opinion is reported at 10 F.C.C.2d 16 (1967), and is printed at pages 106-08 of Appendix A to the Petitions for Certiorari.

The Commission's letter denying the Tobacco Institute's petition for reconsideration of the clarifying ruling is printed at pages 113-15 of Appendix A to the Petitions for Certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[2] Appendices A, B, and C referred to herein are contained in a separately bound document and constitute appendices to the several Petitions for Certiorari separately filed by the petitioning parties. References to those appendices will be in the form "App. A, p. ——". Since the material in Appendix A was extracted from the Joint Appendix filed in the Court of Appeals, the pagination of that Appendix is not consecutive.

Questions Presented

1. Is the FCC's ruling on cigarette advertising in contravention of the First Amendment to the Constitution?

2. Is the FCC's ruling on cigarette advertising in excess of the Commission's statutory authority under the Communications Act of 1934 as amended?

3. Is the FCC's ruling on cigarette advertising preempted by or in conflict with the Federal Cigarette Labeling and Advertising Act or the Congressional purposes and findings that underlie that statute?

Statutes Involved

Sections 2, 4, 5 and 10 of the Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331, 1333, 1334, and 1339; and Sections 307(a) and (d), 309(a), 315(a) and 326 of the Communications Act of 1934, 48 Stat. 1083, 1085, 1088, 1091, as amended, 47 U.S.C. §§ 307(a) and (d), 309(a), 315(a) and 326, are respectively set forth in Appendix C hereto.

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." (U.S. Const., Amend. I)

Statement of the Case

The proceedings leading to the FCC's ruling on cigarette advertising stemmed from a complaint, dated January 5, 1967, which was filed with the FCC against station WCBS-TV, New York, by Mr. John F. Banzhaf III. The complaint asserted that WCBS-TV had aired numerous commercial advertisements for cigarette manufacturers and

demanded that appropriate action be taken against the station because it had failed to make corresponding free time available to recognized anti-smoking organizations to present contrasting viewpoints. (App. A, pp. 14, 15)

The FCC's Initial Ruling

The FCC, without having before it the text of the advertisements referred to in the complaint,[3] and without affording WCBS-TV, or any other licensee or individual, any opportunity to reply, ruled by letter opinion dated June 2, 1967, that its "fairness doctrine" applied to all cigarette advertising, whatever its content, broadcast by any television or radio station. (App. A, pp. 14-17) The FCC's ruling stressed "that our holding is limited to this product—cigarettes". (App. A, p. 15) It stated:

> "We hold that the fairness doctrine is applicable to such advertisements. . . . The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. . . . We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." (App. A, p. 15)

The FCC therefore concluded that "a station which carries cigarette commercials" must "provide a significant amount of time for the other viewpoint . . . ." (App. A, p. 16) The Commission made clear that this requirement had to be met on a regular *weekly* basis. (App. A, pp. 16, 17)

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[3] The complaint had cited three particular commercials, which it did not set forth in detail but instead described summarily in highly generalized terms.

However, the Commission ruled that "The fairness doctrine does not require 'equal time'. . . ." (App. A, p. 15)

Application of the "Fairness Doctrine" Prior to the FCC's Ruling on Cigarette Advertising

The "fairness doctrine" alluded to in the FCC's June 2, 1967 ruling was previously set out in its *Report in the Matter of Editorializing By Broadcast Licensees,* 13 F.C.C. 1246, 25 R.R. 1901 (1949) (hereinafter referred to as the "Editorializing Report"). As explained there, the "fairness doctrine" had been an adjunct of what the FCC regarded as its licensees' general duty to "determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues". (13 F.C.C. at 1247) The Editorializing Report stated:

> ". . . in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness . . . .
>
> • • •
>
> ". . . broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, ..." (13 F.C.C. at 1250-51)

The Editorializing Report also indicated that the manner of application of the "fairness doctrine" by the FCC was of an equally generalized nature—it formed part of the Commission's consideration of a licensee's "overall pattern of broadcast service" at license renewal time (13 F.C.C. at 1255), the test being whether this

> ". . . overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues. The question is necessarily one of the reasonableness of the station's actions, not whether

any absolute standard of fairness has been achieved." (13 F.C.C. at 1255)[4]

Both the substance and the manner of implementation of the FCC's fairness doctrine remained substantially unchanged until July 16, 1963.[5] On that date the Commission issued a Public Notice which reiterated the doctrine in its preexisting general terms but also set forth a mandatory procedure for the allowance of reply time in cases of personal attack and of editorials supporting or opposing political candidates. See the FCC's Public Notices of July 26, 1963, FCC No. 63-734, 25 R.R. 1899 (1963), and July 1, 1964, FCC No. 64-611, 2 R.R.2d 1901 (1964). These mandatory procedures were later adopted as formal Commission rules—which were recently declared unconstitutional by the Court of Appeals for the Seventh Circuit.[6]

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[4] In its later "Fairness Primer", *Applicability of the Fairness Doctrine in the handling of Controversial Issues of Public Importanee*, FCC Public Notice of July 1, 1964, 29 Fed. Reg. 10415, 2 R.R. 2d 1901 (1964), the Commission described the scope of the licensee's discretion as being very broad:

> "[T]he licensee in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming." (*Id.*, 2 R.R. 2d at 1904)

[5] Reviewing the background of the fairness doctrine and FCC regulation of programming during this period, the majority opinion of the Court of Appeals described it as follows:

> "The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made. In practice, the Commission rarely denies licenses for breaches of these duties." (App. B, p. 23a)

[6] The applicability of the fairness doctrine to personal attacks and the promulgation of the personal attack rules have resulted in conflicting decisions in the Circuits, which are scheduled to be re-

(continued)

The ruling on cigarette advertising thus constitutes the second recent effort of the Commission to expand the scope and alter the manner of application of its regulation of programming by adopting what is in effect "a prospective, legislative-type rule".[7] As the majority opinion of the Court below recognized, the ruling on cigarette advertising is "to all intents a novel application" of the FCC's fairness doctrine. (App. B, p. 15a) It not only imposes an "unusual limitation on licensee discretion" by requiring intensive, weekly presentation of a specific FCC-sanctioned viewpoint (App. B, p. 24a), but does so, in the words of the Court of Appeals, in a situation where the so-called "controversial issue" (the effect of smoking on health), which is the touchstone of the fairness doctrine, is raised "only by implication". (App. B, p. 16a) Moreover, the programming that actually triggers the obligation to present the particular contrasting viewpoint required by the Commission, rather than involving any discussion or consideration of public issues, instead contains "no information or arguments . . . which might contribute to the public debate". (App. B, p. 35a)

The FCC's Memorandum Opinion and Order

Since implementation of the FCC's ruling on cigarette advertising would have an immediate impact on the entire broadcasting industry, and since it also augured an ap-

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viewed by this Court during the present term. See *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908 (D.C.Cir. 1967), *cert. granted*, 389 U.S. 968 (1967) (upholding the application of the underlying fairness doctrine to specific cases of personal attack) and *Radio Television News Directors Ass'n* v. *United States*, 400 F.2d 1002 (7th Cir. 1968), *cert. granted*, 37 U.S.L.W. 3247 (Jan. 13, 1969) (invalidating the personal attack rules as an abridgement of freedom of the press).

[7] See the concurring opinion of Commissioner Loevinger (App. A, pp. 93-100, at p. 95) with respect to the Memorandum Opinion and Order of the Commission sustaining its original ruling, discussed below at p. 8.

parent change in the Commission's policy regarding the nature and degree of its regulation over program content, NBC and other broadcasters and organizations, as well as the licensee of the individual station which was the subject of the complaint (CBS, licensee of WCBS-TV), petitioned the FCC for reconsideration of the ruling.

In response to these requests, on September 13, 1967 the FCC issued a lengthy Memorandum Opinion and Order entitled "Applicability of the Fairness Doctrine to Cigarette Advertising". (App. A, pp. 37-106)

At the outset of its opinion, the Commission recognized the legal and economic significance of its ruling:

> "We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS-TV and may necessitate a change in the operations of some." (App. A, p. 40)

The Memorandum Opinion and Order, however, essentially reaffirmed the Commission's earlier ruling:

> "We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials." (App. A, p. 74)

In a separate opinion which considered the same questions embraced in this petition for certiorari, Commissioner Loevinger expressed "great doubt and reluctance" as to whether the Commission's ruling was, *inter alia*, "substantially consistent with controlling legal rules", but nevertheless concurred because "the result seems to me to be socially and morally right." (App. A, p. 93) He also stated, somewhat inconsistently:

> ". . . [A] burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in

a regulatory agency nor provides a sound legal guide to action. The instant proceeding illustrates the point." (App. A, p. 94)

The FCC's Clarification Ruling

In its Memorandum Opinion, the FCC had stated that there was "no inequity" in the fact that its ruling utilized cigarette advertising (which is "precluded by various industry codes and by the Federal Trade Commission from making affirmative health claims") to trigger a required presentation of the view that smoking was harmful to health, because—

> "The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials." (App. A, p. 70)

On September 21, 1967, in a clarification letter to Metromedia, Inc., the FCC amended its Memorandum Opinion by eliminating the foregoing requirement and stating that broadcasters who adhered to its ruling were under no obligation to offer rebuttal time to proponents of the view that smoking is not harmful to health. (App. A, pp. 106-08)

The Proceedings in the Court of Appeals

Petitions to review the FCC's ruling on cigarette advertising were filed by various interested parties in the Fourth Circuit and in the District of Columbia Circuit. Jurisdiction in the Courts of Appeals was based on: Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), 48 Stat. 1093; Sections 2 and 8 of the Judicial Review Act of 1950, 28 U.S.C. § 2342, 80 Stat. 622 and 28 U.S.C. § 2348, 80 Stat. 623; Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, 80 Stat. 378; and 28

U.S.C. § 2112, 72 Stat. 941. The proceedings in the Fourth Circuit were subsequently transferred to the District of Columbia Circuit and consolidated with the proceedings there pending.[8]

After the cases were consolidated in the District of Columbia Circuit, the Court of Appeals, in a 2 to 1 decision, affirmed the FCC's ruling. (Judge Miller dissented without opinion from the majority's decision, except from that portion thereof which affirmed the FCC's denial of Mr. Banzhaf's demand that *equal* time be allotted the anti-smoking viewpoint.)

Reasons For Granting the Writ

This case raises fundamental questions as to the statutory basis for, and the constitutionality of, the FCC's power to require the presentation of designated viewpoints on public controversies. These questions, on which this Court has never before ruled, are closely related to issues which the Court has already determined to review in two cases presently pending before it.[9] Moreover, consideration by this Court is particularly necessary and appropriate because the Court of Appeals and the FCC rationalized differently the constitutional and statutory basis for the Commission's action so that the scope and limits of the Commission's power will, unless this Court acts, be confusing and unclear.

Finally, this case presents an important question as to the scope of the preemption imposed by the Federal Ciga-

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[8] Prior to this tranfser, NBC and other broadcasters who had been parties in interest before the FCC for review of its initial ruling had been granted leave to intervene by the Court of Appeals for the Fourth Circuit.

[9] *Red Lion Broadcasting Co.* v. *FCC, supra; Radio Television News Directors Ass'n* v. *United States, supra.*

rette Labeling and Advertising Act. The action taken by the Commission and approved by the Court seriously subverts the objectives of Congress in enacting that statute.

I

The FCC's Ruling Is Inconsistent With the First Amendment.

The Commission's ruling on cigarette advertising is one illustration of its recently proliferating activity in prohibiting, discouraging, or compelling particular programming by broadcast licensees. Prior to this Term, this Court has never found it necessary to define the Commission's role in this area. The Court may provide answers to some of these questions when it rules on *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908 (D.C. Cir. 1967), *cert. granted*, 389 U.S. 968 (1967) and *Radio Television News Directors Ass'n* v. *FCC*, 400 F.2d 1002 (7th Cir. 1968), *cert. granted*, 37 U.S.L.W. 3247 (Jan. 13, 1969), which are presently before it. This case presents another facet of this same congeries of problems. The resolution of these problems is the most challenging, significant, and far-reaching task this Court has ever been asked to undertake with respect to broadcast communication. The Court's rulings will forge a framework for the future development of broadcasting, its relationship with the government, and its place in our rapidly developing and changing society.

We are all familiar with the turmoil in our nation today and the intensity with which conflicting views are held and positions asserted. At such a time, when broadcasters and the Commission are under increasing pressure from a multitude of sources,[10] it is vital that the limits around the

[10] A recent example of this type of pressure occurred following the Democratic National Convention held in Chicago in August, *(continued)*

permissible scope of governmental regulation be clearly drawn. This case calls for the setting of such limits in one of the directions in which the Commission has sought to move.

The Basis of the Ruling of the Court of Appeals

The Commission, in making its cigarette advertising ruling, characterized it as an application of the general "fairness doctrine" and justified it as a means of compelling broadcasters to inform their audience "of the other side of this controversial issue of public importance—that however enjoyable, . . . smoking may be a hazard to the smoker's health." (App. A, p. 39)

The Court of Appeals was obviously troubled by the Constitutional problems posed by the "fairness doctrine".[11]

1968. The FCC wrote to NBC, and to the other networks, demanding that they respond, within 20 days, to its request for comment on the "hundreds" of complaints received by the Commission with respect to the convention coverage. The Commission characterized these complaints as involving the following objections: "Failure to give exposure to the views or statements of city government officials of Chicago, with respect to alleged 'brutality' by the police; and bias in favor of views or opinions in opposition to the policies of the national government with respect to the war in Vietnam." Letter of September 13, 1968 to NBC from William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, FCC. It is evident that the Government's calling a journalist to task for his treatment of issues as explosive as these cuts to the very heart of the free press. It is a danger not to be minimized.

[11] It should be noted that NBC's constitutional argument did not have quite the scattergun effect which the Court below attributed to it. Thus, the Court said that NBC argued that "the public interest standard cannot constitutionally now include any component of program content." (App. B, p. 31a) While NBC believes that any program-oriented regulation raises constitutional issues, its attack here was only directed, first, against the "fairness doctrine", which the Commission's ruling purported to apply, and, second, against the specific ruling here in issue.

It recognized "considerable force" in the argument, which it characterized as "cogent", that no regulation of programming is constitutionally justifiable. It acknowledged that "It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (App. B, p. 32a)

The Court, therefore attempted to narrow the issue. It avoided sustaining the cigarette ruling as an application of the "fairness doctrine", but rather characterized it as being based on a "narrow public health power" (App. B, p. 34a), and as constituting a "public health ruling" (App. B, p. 34a). In effecting this transmutation the Court radically altered the basis of the ruling. Rather than a directive to the broadcast press to present both sides of an issue merely because it is controversial, we now have a directive to disseminate a certain viewpoint because it is respectably endorsed and bears on the public health.

There are at least two difficulties with this shift in the Court's emphasis. First, the Commission did not approach the matter in these terms. The Commission, in the proceedings before it, did not take evidence on the medical questions whether, how, to what extent, or in what circumstances, cigarette smoking is harmful to health. It merely noted the continuing controversy on the subject and that Congress, in view of the existing state of the evidence, was unwilling to decide the question.[12] Thus in its brief in the Court below,[13] the FCC noted that the

[12] The action taken by Congress is described in Point III, *infra*, in connection with the discussion of the preemption and conflict issues raised by the Federal Cigarette Labeling and Advertising Act of 1965.

[13] Hereinafter cited as "Resp. Br.".

House Committee was not "willing to opt for either medical opinion. . . ." (Resp. Br., p. 34) Moreover, rather than finding that smoking is harmful to health, the Commission correctly emphasized that it ". . . is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue." (App. A, p. 86) The *only* finding made by the Commission was that some respectable authorities hold the antismoking view and that there is *controversy* on the question.

Moreover, the Commission's ruling was peculiar as a "public health" measure. The sale of the product was not proscribed or limited. Rather, the remedy imposed was to require broadcasters who carry cigarette advertising (which itself in no way discusses the health issue[14]) to speak out or find others to speak out exclusively on the antismoking side of that admittedly controversial issue.

No one denies that Congress and the agencies which Congress creates can regulate dangerous products. On appropriate findings the distribution of products may be forbidden, and violators subjected to criminal penalties. The justification for such regulation lies in the fact that it can prevent social ills and can be based on standards susceptible of reasonably fair and efficient definition and application. If the test is whether a product produces harm sufficient to warrant prohibiting or limiting its sale, Congress or the agency charged with responsibility can determine what the harm is and whether the need for or utility of the product is sufficient to warrant risking that harm.

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[14] Health claims are forbidden by the cigarette manufacturers' own advertising code and by the FTC Cigarette Advertising Guides. (CCH Trade Reg. Rep. ¶ 7894)

The Commission has operated under no comparable authority and under no comparable set of standards. It has not determined (and has correctly concluded that it is not the proper agency to determine) whether the product is or is not harmful, but only that there is an outcry from a number of sources. It has not determined that the advertisements are in any way false or misleading, but only that, in its view, they imply something about health. Administrative action with enormous impact, not only on the financial fortunes of those who feel the effect of the regulation, but also on the content of what is published by an important segment of the press, cannot properly be rested on criteria so amorphous.

It is evident that the ruling is difficult to explain or justify as a public health ruling and that the "public health" rationalization is merely an effort to obscure the risks to a free press which are inherent in it.

The Danger to the Broadcast Press

While the Court of Appeals dealt at length with the First Amendment issue, it struck only a glancing blow at the real risk to a free broadcast press which NBC emphasized in its briefs. Thus, the Court argued at length that the ruling "does not ban any speech" (App. B, p. 34a), that cigarette advertising, being "commercial speech" only "barely qualifies as constitutionally protected 'speech' " (App. B, p. 34a), that there is no substantial danger that this "commercial speech" will be "significantly chilled" (App. B, p. 36a), and that overall good will be done because additional speech will be compelled. (App. B, pp. 36a-38a)

Finally, and only very briefly, did the Court touch on the real risk which NBC emphasized in its briefs to that Court. *The risk to the free press is not that cigarette*

advertising will be "chilled" or discouraged, but that the Commission, by the selective application of a vague and undefinable standard, will be able to compel the expression of particular viewpoints on particular subjects; and thereby to control, to an impermissible degree, what an important segment of the press says.[15]

Unlike the preexisting fairness doctrine, which is applied in the context of a broadcaster's overall programming, the ruling on cigarette advertising is a "prospective legislative type rule" (App. A, p. 95) requiring regular weekly presentation of a particular responsive viewpoint which the Commission thinks should be expressed. The fact that the requirement is conditioned on the carrying of particular product advertising is not sufficiently limiting to avoid the danger. So long as our broadcasting system is dependent on revenue from the advertising of a multitude of products, the Commission, by selectively invoking its rule, can control to a considerable degree the content of what is broadcast.

Nor does the fact that the specific application of the Commission's policy in the instant case involves an alleged health danger solve the problem. As Commissioner Loevinger recognized, cigarettes are not the only product which has been claimed to be inherently harmful to health,

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[15] As Professor Chafee has said, one of the things most clearly within the concept of censorship is "dictation as to what should go into particular programs." (Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1965), p. 641). And this Court has recognized that compelling expression of certain viewpoints is as much a violation of the First Amendment as is the forbidding of expression. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.").

or which has been the subject of studies by authoritative sources which have concluded or suggested that harm might result from its normal use.[16] Harm or risk or inadequacy of some kind have been attributed, at one time or another, to most products, with varying degrees of rationality and varying degrees of merit in the criticism. For example, respectable authorities have seen risks in pesticides,[17] tranquilizers,[18] saturated fats and cholesterol-laden foods,[19] artificial sweeteners,[20] allegedly unsafe makes or models of American automobiles[21] and many other products. The Commission has already identified fluoridation and "the nutritive qualities of white bread" as controversial issues to which the fairness doctrine

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[16] Commissioner Loevinger said:

"The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (par. 46), the 'normal use' of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids." (App. A, p. 96)

[17] R. CARSON, THE SILENT SPRING (1962), *passim*, especially pp. 158-61, 202-04.

[18] See Hammond, *Smoking in Relation to Mortality and Morbidity*, Statistical Research Section, Medical Affairs Department of the American Cancer Society.

[19] F. Moor, *Serum Cholesterol Levels in Adults—United States 1960-62*, published by the National Center for Health Statistics (Series II, No. 22); Grande, *Dietary Factors and Serum Cholesterol*, in PREVENTION OF ISCHEMIC HEART DISEASE, at p. 266 (Raab ed. 1966).

[20] See, *e.g.*, Sayer, *Artificial Sweeteners—Their Impact on the Food Laws*, 21 FOOD, DRUG, COSMETIC LAW JOURNAL 111 (1966), pp. 111-12; XVIII News Report, National Academy of Sciences. No. 3, p. 6 (March 1968).

[21] R. NADER, UNSAFE AT ANY SPEED (1965); KEARNEY, HIGHWAY HOMICIDE (1966).

applies.[22] Moreover, the concept of public health is an elastic one; does it not, for example, include mental and emotional health? It is evident that the Commission's judgment is wholly subjective; there is an enormous range within which reasonable persons can differ as to what viewpoints on what public controversies are essential to present what the Court below characterized as the "crucial . . . accurate picture". (App. B, p. 29a)

Moreover, no reason appears why harm to health henceforth will, or logically should be, accorded a favored status by the FCC as opposed to harm to other "public interests", *e.g.*, the protection of property, national defense, physical comfort and well-being, environmental beauty, or moral or spiritual values. If the Commission is empowered to compel the broadcasting of material responsive to advertising of products claimed to be harmful to health, can it not be argued that the broadcasting of responsive material may also be compelled in connection with the advertising of products claimed to be harmful in any other way?

The danger is compounded by the fact that the Commission's new power is not necessarily limited to compelling broadcasts responsive to "viewpoints" expressed in commercial advertising. It rests on the fairness doctrine, which had its genesis in situations where there had been discussion of a controversial issue, not where there had been solicitation to buy a product. And, while the Court seeks to limit the ruling to situations involving public health, it is not clear that it would limit it only to public

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[22] See *Broadcast of "Living Should Be Fun" Inquiry*, 33 F.C.C. 101, 107 (1962). Commercials involving fluoridated toothpaste might serve to impel responsive presentation of the anti-fluoridation viewpoint under the FCC's new application of its fairness doctrine. This would apparently be true even if the commercials said nothing about fluoridation or its advantages, since the fluoridation issue would presumably be raised "by implication".

health questions raised by advertising. If, in determining what issues are raised by non-advertising program materials, the Commission is to be as subtle in finding positions taken "by implication" as it has been here,[23] then it would be able to regard almost *any* broadcast as expressing a "viewpoint" to which some response might be necessary.[24]

In short, what inevitably emerges from the rationale set forth for the FCC's action is a roving commission in the FCC to sift and weigh what is presented by broadcasters to determine when (by some wholly subjective standard which the Commission has failed to articulate) contrary opinions have a sufficient consensus or are expressed with sufficient stridency to move the Commission to action, and then to compel the broadcasting of material setting forth a governmentally designated responsive viewpoint which the Commission regards as necessary to show which way "the actual odds lie" and to portray the "crucial . . . accurate picture". (App. B, p. 29a)

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[23] The arbitrary nature of the ruling is also manifested by the fact that the Commission, which has here decided that a controversial issue can be raised *by implication*, made precisely the opposite finding in previous cases. Compare the instant determination with the FCC's decision in *Mrs. Madalyn Murray*, 5 R.R.2d 263 (1965). With respect to this inconsistency, the Commission merely asserted that ". . . we do not regard those cases as pertinent here in view of the nature of the controversial issue." (App. A, p. 69, n. 21)

[24] If the Commission regards every cigarette commercial as expressing a view on the health hazards of cigarette smoking, might it not with equal reason regard the smoking of a cigarette by the protagonist in a play as expressing a pro-smoking point of view, or the telecasting of a military parade as expressing a pro-war point of view, or the televising of a view of a smog-choked city as expressing a point of view on the subject of air pollution, or coverage of a political convention or of police reaction to disorder in the streets as presenting some other particular point of view?

The Conflict with the Decision of the Seventh Circuit in the *Radio Television News Directors* Case

The decision of the Court of Appeals is premised, in part, on the drawing of a distinction between the First Amendment protection afforded the printed press, and that afforded the broadcast press. Such a distinction is untenable and was explicitly rejected in the ruling of the Court of Appeals for the Seventh Circuit in *Radio Television News Directors Association* v. *United States, supra.*

This Court has frequently made it clear that radio, motion pictures and television enjoy the constitutional protection afforded the "press" by the First Amendment. See, *e.g., Lovell* v. *City of Griffin,* 303 U.S. 444, 452 (1938): "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." See *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948):

> "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." (334 U.S. at 166)[25]

In rejecting any distinction between the broadcast and printed press as untenable for First Amendment purposes, the Seventh Circuit concluded, in the *Radio Television News Directors* case, *supra* (400 F.2d at 1018-1020), that the modern proliferation of broadcasting outlets had rendered "unpersuasive" what theretofore had been the "most frequently advanced" contention of those who argued that such a distinction should exist—namely, that the broad-

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[25] See also *Rumely* v. *United States,* 90 App.D.C. 382, 197 F.2d 166, 177 (D.C. Cir. 1952), *aff'd,* 345 U.S. 41 (1953); *American Broadcasting Co.* v. *United States,* 110 F.Supp. 374, 389 (S.D.N.Y. 1953), *aff'd,* 347 U.S. 284 (1954).

casting media had a limited supply of outlets and was not "available to all" (*Ibid.*). The Seventh Circuit said:

> "Data comparing the broadcast press and the printed press . . . shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers. In most major metropolitan areas, there are several times as many radio and television stations as there are newspapers." (400 F.2d at 1018-1019)[26]

The Seventh Circuit also characterized the Commission's arguments based "on the concept of public ownership of space or airwaves" as "logically . . . meaningless" (400 F.2d

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[26] This conclusion is supported by statistical studies which show that there are today a great many more broadcasting stations serving the public both nationally and in most local areas than there are daily newspapers. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, 491, 500 (1961); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 519, 523 (87th ed. 1966); FCC Public Notice-B No. 12,895 released on February 13, 1968; U.S. BUREAU OF THE CENSUS, COUNTY AND CITY YEARBOOK, 1967, Table 3; EDITOR AND PUBLISHER YEARBOOK, 1966; BROADCASTING YEARBOOK, 1966; and TELEVISION FACT BOOK, 1966. Whether the scarcity argument ever had merit is questionable, since *at the time when the First Amendment was adopted,* there were severe technological limitations on the production of newspapers in this country. Printing presses were few in number and were expensive, and the necessary metal type and suitable inks and papers usually had to be imported from Europe at considerable expense. All communications were extremely slow, and there was no regular postal service. It is estimated that in 1776 there were only 41 newspapers in all the colonies. See S.N.D. NORTH, THE HISTORY & PRESENT CONDITION OF THE NEWSPAPER & PERIODICAL PRESS OF THE UNITED STATES (Tenth Census of the United States, Vol. 8, 1884); CHENERY, FREEDOM OF THE PRESS, 142 (1955). With these factors of "scarcity" then present, there was far more occasion for concern that such facilities as were available might be irresponsibly or unfairly used than exists today. Nevertheless, rather than imposing governmental controls to insure that the printed press be well used, the men who wrote our Constitution framed the First Amendment, broadly prohibiting *any* law abridging the freedom of the press.

at 1019).[27] Indeed, even the Court of Appeals in this case recognized that the concept of "public ownership of the airwaves" is not an adequate answer to the First Amendment problem. (App. B, pp. 31a-32a)

The majority below declined to adopt the Seventh Circuit's holding as to the constitutional equality of the broadcast and printed press, and advanced three reasons for rejecting it. It is submitted that none of them is persuasive.

(i) *The "rich variety of outlets" argument*

> "Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion . . . which are available to those without technical skills or deep pockets." (App. B, p. 32a)

This argument rests upon the premise that patrons of the broadcast press (unlike newspaper readers) exist in a vacuum, isolated from and unaffected by all other communications media, and therefore must be guaranteed a "fair" presentation of public controversies. The Seventh Circuit expressly rejected this reasoning in the *Radio Television News Directors* case, stating:

> "Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television

[27] The Seventh Circuit also flatly rejected the FCC's claims that this Court's decision in *National Broadcasting Company, Inc.* v. *United States*, 319 U.S. 190 (1943), supported, or even had any relevance to, the proposition that the broadcast press is not entitled to the same degree of protection as the printed press (400 F.2d at 1018, n. 43).

> in conjunction with other media of communication." (400 F.2d at 1020)[28]

The availability of such inexpensive means of expression as journals, pamphlets, and circular letters is as much an argument for unfettered broadcasting as it is an argument for unfettered newspapers. The fact is that the various media and modes of expression constitute a continuum, not a series of discrete categories of expression each reaching a different audience.[29] That continuum embodies today a diversity of expression unprecedented in the history of our country or any other.

(ii) *The "affirmative act" argument*

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air'." (App. B, p. 33a)

This "distinction" is also highly dubious. The "affirmative act" necessary for reading finds its counterpart in the requirements of switching on a set, tuning to a particular station, and perhaps (in the case of television) focusing the reception. Even the "habitual" television

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[28] See also Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and The Local Service Obligation: Implications of Technological Change,* at pp. 2-3 (U.S. Government Printing Office, 1968).

[29] *E.g.,* Blumer, *Suggestions for the Study of Mass Media Effects* (Chapter 10 of BURDICK & BRODBECK, AMERICAN VOTING BEHAVIOR (Free Press 1959)), at pp. 199, 208. There is considerable evidence that, within this continuum, the formation of personal opinions is much more affected by interpersonal private communications with friends and acquaintances than by the mass media. KATZ & LAZARSFELD, PERSONAL INFLUENCE (Free Press 1955), pp. xv (Foreword by Elmo Roper), and see *id.* at p. 3; Berelson, *Communications and Public Opinion,* in SCHRAMM, MASS COMMUNICATIONS (Univ. of Ill. Press, 2d ed., 1960), pp. 531-32.

viewer can avoid any particular television programming, either by turning the dial, or simply by not paying any attention to it.

Certainly, if the unavoidability of the original contact with the message is the determinative factor, the argument would apply with equal force to any strategically placed article in a daily newspaper, and certainly to such common phenomena as billboards and subway posters. Even if, however, there is a degree of difference between the ease of reaching a television viewer and the ease of reaching a newspaper reader, it supports the view that freedom of the broadcast press must be the more carefully guarded. To the extent that a medium's impact is more pervasive and far-reaching, it becomes *more* urgent that governmental influence on the content of what is disseminated be prevented.

(iii) *The "subliminal impact" argument*

> "It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." (App. B, p. 33a)

Neither the Court below nor the Commission was presented with or considered evidence of any kind as to the supposed "subliminal" impact of broadcasting, or of the relative effectiveness of the spoken over the written word. It may be that the staying power of written material—which continues to be available at all times for rereading by the original reader and others, while the broadcast message once conveyed is gone—counterbalances the "difficult to calculate . . . subliminal impact" of the latter. In any event, the difference, if any, is only one of degree. And,

again, if the subliminal impact of broadcasting is greater, the danger of governmental intrusion is the more serious.

In the final analysis, the only relevant uniqueness of modern broadcasting stems from the phenomenon of electromagnetic interference and the need, upon occasion, to choose among applicants for broadcasting licenses. As both the Court below and the Seventh Circuit recognized, the tremendous technological advances of recent years have greatly reduced the significance of these factors. Even if some government regulation of broadcasting is, and continues to be, necessary, it does not follow that the Commission must be able to regulate the "fairness" of what is broadcast, or dictate that a particular responsive viewpoint must be presented—particularly in the most sensitive area of speech, controversial issues of public importance. *The fact that some regulation is necessary and that some privilege is granted in no way implies that the extension of the privilege may carry with it governmental surveillance or control over the content of what is expressed.* Even the enormously valuable second-class mailing privilege may not be denied to a periodical because it is not "fair" on a controversial issue. *Cf. Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946).

The ruling affirmed by the Court of Appeals is dangerously wrong. It rests on an unsound distinction between the broadcast and the printed press and gives the FCC an undefined and undefinable power to compel expression on controversial questions which is contrary to the traditions of a free press in a democratic society. The ruling is contrary to the decision of the Court of Appeals for the Seventh Circuit; certiorari should be granted and the ruling should be overturned.

II

The Commission's Ruling is in Excess of its Statutory Authority.

The next question presented by the decision below—whether the FCC's ruling on cigarette advertising is in excess of its statutory authority under the Communications Act of 1934—also warrants the attention of this Court.

The Court below has approved a vast expansion of Commission power over the autonomy and discretion of the broadcast press without any express or implied congressional authorization for such an encroachment. The Court below recognized that there is "substantial support from Supreme Court decisions" [30] that there must be a "clear mandate for regulatory activity which brushes against sensitive constitutional areas". (App. B, p. 18a) No such mandate has been given here.

The principal materials relevant in determining whether the power claimed by the Commission has been given it are as follows:

(1) Various provisions of the Communications Act of 1934 vested the FCC with power to grant, revoke or deny broadcast licenses, and applications for the renewal thereof "in the public interest". (47 U.S.C. §§ 307(a) and (d), 309(a))

(2) Section 326 of the Communications Act expressly provides, *inter alia*, that "Nothing in this chapter shall be

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[30] See, *e.g.*, *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963); *Smith* v. *California*, 361 U.S. 147, 151 (1959).

understood or construed to give the Commission the power of censorship. . . " (47 U.S.C. § 326)

(3) In 1959, an amendment was adopted to Section 315(a) of the Act (concerning "equal opportunities" in broadcasts by candidates for public office) which, after expressly exempting certain news programs from the "equal opportunities" requirements of that section, provided that nothing in the exemption:

> ". . . shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (47 U.S.C. § 315(a))

This amendment was adopted in response to an administrative determination by the FCC which had given an overly broad construction to the preexisting language of Section 315(a). See, *CBS, Inc. (Lar Daly case)*, 18 R.R. 701 (1959).

In *Red Lion Broadcasting Co.* v. *FCC, supra*, the District of Columbia Circuit held that the 1959 amendment to Section 315(a) incorporated the "fairness doctrine" as expressed in the Commission's Editorializing Report (381 F.2d at 930). The majority below, citing the amendment and this Court's decision in *National Broadcasting Company* v. *United States*, 319 U.S. 190 (1943), has now held that there is also statutory authorization for the instant ruling.

Whether the 1959 amendment or the decision in *National Broadcasting Company* v. *United States, supra*, justify such a finding of statutory authorization even as to the pre-

existing fairness doctrine is dubious.[31] It is clear, however, that they do not provide any support for the vast expansion of Commission power represented by the instant ruling. The ruling on cigarette advertising represents a "novel" expansion of FCC power (see pp. 5-7, *supra*) and as such must be assessed under the modern precedents of this Court to see whether it "can stand on its own feet". (App. B, p. 17a)[32] That it cannot do so is manifest.

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[31] The 1959 amendment was not intended to expand or increase the Commission's statutory powers over those which had previously been established by the "public interest" provisions of the Act. See, the *Staff Study for the House Committee on Interstate and Foreign Commerce, "Legislative History of the Fairness Doctrine"*, 90th Cong., 1st Sess. (1958), which concludes that the "more accurate reading of the legislative history" of the 1959 amendment would be that Congress intended not to ratify or codify the fairness doctrine but instead "intended neither approval or disapproval" thereof, *i.e.*, its purpose was simply not to affect or interfere with the preexisting doctrine with respect to political questions one way or the other (p. 29).

Likewise, the Commission's statutory powers were alluded to only in highly generalized terms in the *National Broadcasting Company* case. The case itself merely involved a series of trade regulations, only one of which pertained even indirectly to program content and none of which constituted a regulation of the content of programming.

Moreover, in the earlier case of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), this Court said very explicitly that: "[T]he Act does not essay to regulate the business of the licensee. *The Commission is given no supervisory control of the programs,* of business management or of policy." (309 U.S. at 475) (emphasis supplied.)

[32] As noted by Commissioner Loevinger, the conclusion that Section 315(a) and the Editorializing Report, which refer to and define the "fairness doctrine" only in the context of "commentary" and "discussion", can be *ipso facto* expanded to apply to programming which in no way involves these factors, is "most dubious". (App. A, p. 96) See Appendix A to the FCC's 1964 Fairness Primer, 2 R.R.2d 1901, 1923 (1964) which confirms that the doctrine theretofore encompassed responsive viewpoints pertaining to programs addressed to "the discussion and consideration of contro-

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The opinion of the majority below acknowledged that:

> "... especially with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards." (App. B, p. 24a)

The majority agreed therefore that the Commission's ruling could not be upheld "merely on the ground that it may reasonably be thought to serve the public interest". (App. B, pp. 24a-25a) However, they asserted that "Whatever else it may mean . . . we think the public interest indisputably includes the public health". (App. B, p. 25a) The majority then concluded that although the "public health" standard was concededly also "murky at the fringes", the ruling on cigarette advertising was sufficiently specific, and addressed to such a real and impressively documented danger, that it was "vulnerable to none of these objections against a broad mandate to the Commission to consider the public health". (App. B, pp. 26a-27a)

Thus, the majority below in effect concluded that congressional authority to adopt the ruling on cigarette advertising could be inferred—even though the Communications Act says nothing about the public health (let alone about the public health and smoking), but alludes only to the "public interest"—because such authorization would, in the majority's view, have been sufficiently clear and reasonable had it been expressly granted.

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versial issues. . . ." Moreover, until recently the Commission made it clear that in applying the fairness doctrine the licensee was required only to make a *reasonable judgment* as to whether a controversial issue was raised and, if so, how it could fairly be presented, *Fairness Primer*, Commission Public Notice 64-611, 2 R.R. 2d 1901, 1904 (1964); Commission Letter to Honorable Oren Harris, FCC Public Notice 63-851, 3 R.R.2d 163, 167 (1963). By the ruling here at issue the Commission itself, *not* the licensee, makes those judgments.

This determination is not only contrary to all of the modern determinations of this Court concerning the standards of specificity required for statutory provisions affecting First Amendment rights; it also conflicts directly with this Court's determination in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946) that the Postmaster General's refusal to grant a second class mailing permit on the ground that the published material did not serve the "public welfare" involved a censorial power that had not been delegated by Congress. See also *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *cf.*, *Milwaukee Pub. Co.* v. *Burleson*, 255 U.S. 407, 437 (1921) (dissenting opinion).

III

The FCC's Ruling was Preempted by and in Conflict with the Cigarette Labeling and Advertising Act of 1965.

Finally, certiorari should be granted to review the decision of the Court of Appeals that the Commission's ruling is neither preempted by, nor inconsistent with, the Cigarette Labeling and Advertising Act. The decision is on a matter of great public importance, and is contrary to the intent of Congress as reflected in both the language and legislative history of the Act.

No extended argument is necessary to demonstrate that the nature and extent of the regulation of cigarette advertising which Congress has authorized is an issue worthy of this Court's attention.

Analysis of the Cigarette Labeling Act and its legislative history demonstrates that it was based on three important Congressional determinations:

(1) that, while there are substantial indications that smoking may be harmful to health, there is conflicting evidence on the question and it deserves further study;

(2) that the dissemination of further information to the public is desirable; and

(3) that, in the light of the uncertainty on the question, and in the light of the economic importance of the tobacco industry, and related economic factors, no *regulation of cigarette advertising* other than the congressionally mandated labeling requirement should be imposed pending further study and further action by Congress.

These conclusions are well summarized in Section 2 of the Act which provides for the establishment of a "comprehensive federal program" the principal objectives of which are to inform the public "that cigarette advertising may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes" and to protect "commerce and the national economy" against "diverse, non-uniform, and confusing labeling and advertising regulations with respect to any relationship between smoking and health." (15 U.S.C. § 1331)

Sections 4 and 5 of the Act provide the basic framework of the "comprehensive Federal program". Section 4 sets forth a specific health warning requirement for cigarette packages (15 U.S.C. § 1333) and Section 5(a) renders this labeling requirement exclusive. (15 U.S.C. § 1334(a)) The remaining provisions of Section 5, which is entitled "Preemption", further implement the congressional judgments referred to above.[33] Section 5(b), which pertains directly to advertising, states:

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[33] Section 5(d) calls for further studies and reports on these matters to be submitted to Congress by the Federal Trade Commission and the Secretary of Health, Education and Welfare. (15 U.S.C. § 1334(d))

"No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (15 U.S.C. § 1334(b))

Section 10 of the Act, which establishes a three year period for consideration of the further studies contemplated under Section 5(d), also confirms Congress' intention to prevent further "regulation of advertising" during this moratorium period:

"The provisions of this chapter which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to July 27, 1965." (15 U.S.C. § 1339)

This intention to preclude any new or additional regulations pertaining to or affecting cigarette advertising during the moratorium period is also confirmed by the Act's legislative history. For example, Congress specifically rejected a proposal to make Section 5(b), the advertising proviso, applicable only to the FTC and thus to leave the way open for other agencies to regulate cigarette advertising. (See S.Rep. No. 195, 89th Cong., 1st Sess., at 32 (1965)). The Report of the Senate Commerce Committee accompanying the Act clearly articulated the legislative intention to give existing controls a chance to prove their effectiveness:

"Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of

this bill, it was the committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking." S.REP. No. 195, 89th Cong., 1st Sess., at 5 (1965).

In connection with this intention to establish a trial period for existing controls, it is also of particular significance that the Senate Commerce Committee (which had jurisdiction over the cigarette legislation and is also the Senate Committee most directly concerned with FCC matters) was operating on the assumption that the opponents of smoking could offer to present their views on radio and television on public service time voluntarily made available by broadcasters but that the stations were not obligated to use their public service time for this purpose:

"[Senator Magnuson] Of course it will be up to the individual licensees to take it or not take it.

"[Surgeon General] That is right, sir. . . ." (*Hearings Before the Senate Committee on Commerce on S. 559 and S. 547*, 89th Cong., 1st Sess. (1965) at 40-41)

Finally, in the course of the floor debate on the Act, Senator Cotton (the ranking minority member of the Committee) plainly stated that it was the intention of an "overwhelming majority" of the Senate Committee on Commerce that "any restriction in the matter of advertising in magazines and elsewhere should be held in abeyance". (111 CONG. REC. 13899)

The Court of Appeals, in its opinion, went far toward recognizing that the Congressional intent was as we have described it above. Thus, the Court noted that Congress was "uncertain of the full extent of the health hazard . . ." (App. B, p. 10a) and went on to say:

"Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising. In addition, it evidently decided that the case against smoking was not yet so overwhelming as to warrant compelling the cigarette companies to dig their own graves by neutralizing their own advertising messages." (App. B, p. 13a)

Having recognized all of this, it is difficult to understand why the Court did not directly grapple with what we consider to be, at the very least, a difficult issue: Is the FCC's requirement that radio or television advertising be accompanied by anti-smoking material, on a weekly basis, a "regulation of advertising" which Congress intended to foreclose?

The Court avoided facing up to this issue, first, by misstating the petitioners' position, and, second, by begging the question stated above.

The Court describes petitioners' position as being that Congress "meant to forbid any regulation addressed to the smoking-health problem except the Federal Trade Commission's specifically exempted power to police false and misleading advertising." (App. B, pp. 7a-8a) This is a distortion of petitioners' contentions. Properly stated, our contention is that Congress intended to foreclose any regulation, however denominated, *which is, in purpose or effect, a regulation of cigarette advertising.* In its brief in the Court of Appeals the Commission raised the spectre that, if our arguments were accepted, they might invalidate, among other things, state laws forbidding sales of cigarettes to minors and laws requiring smoking education campaigns in the schools. (Resp. Br., pp. 40-41) As

we pointed out below, regulation under such laws is unrelated to *cigarette advertising* and is therefore easily distinguished from the ruling here at issue.

Again, the Court distorts the central issue when it says:

> ". . . we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking." (App. B, p. 12a)

Of course, Congress did not intend to impede the flow of such information; indeed it took specific steps to encourage the collection and dissemination of such information. It did, however, exhibit its great concern over any kind of regulation which impinged upon the carrying of cigarette advertising or was triggered by the carrying of such advertising.

Thus, the Court's cavalier assumption, that a sharp line can be drawn between "regulation of *broadcasters* designed to inform the public" (App. B, pp. 13a-14a) and the *regulation of advertising* which Congress intended to prevent, was not justified. It is obvious that a regulation of broadcasters may easily also be a regulation of advertising. *Cf. Weber* v. *Anheuser-Busch Co.*, 348 U.S. 468, 479 (1955).

The real question, which the Court did not reach, is whether the FCC's ruling imposes a burden on cigarette advertising of a kind which Congress intended to preclude during the moratorium period. We believe it evident that such a burden is imposed.

The Commission itself recognized the problem. In its brief in the Court below, the Commission conceded that

Section 5(b) of the Act precludes it from requiring that statements of health warnings be included in the advertising and "possibly even adjacent to cigarette commercials." (Resp. Br., p. 41) Obviously, there is no significant difference between requiring a warning in the advertising and requiring a warning immediately at the close of the advertising.

The Commission also conceded in its opinion denying the Petitions for Reconsideration that to require that *equal* time be given to programming with respect to the health issue "would be inconsistent with the Congressional direction in this field provided in the Labeling Act" because, in the Commission's words, "the practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." (App. A, p. 57)

In making these concessions the Commission acknowledged that Congress intended, in enacting the Cigarette Act, to prevent not only direct regulation of the content of cigarette advertising, but also regulatory activity which might discourage or inhibit cigarette advertising by placing economic or other burdens on it. Having made this concession, it is difficult to understand how the Commission can draw a viable distinction between the ruling which it made here and the regulatory activities which it admits Congress intended to bar.[34]

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[34] The Court below avoided the question whether the requirement of an "adjacent" warning would be permissible. (App. B, p. 13a, n. 29) The Commission never defined what it meant by "adjacent". No criterion is suggested by which the Commission or the Court has been able to determine that the requirement of the broadcasting of a warning within a minute or an hour after the advertisement has been broadcast is invalid or of doubtful validity, but that the requirement of the broadcasting of such a warning during the same day or the same week or the same month is proper.

In fact, application of the controlling precedents of this Court clearly demonstrates that the action which Congress took precluded any new controls affecting cigarette advertising since "the test . . . is whether the matter is in any way regulated by the Federal Act". *Charleston & Western Carolina R.R. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597, 604 (1915). See also *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 240 (1947). Since the Cigarette Act was clearly intended to occupy the field of cigarette advertising regulation during the moratorium period, it preempted the FCC from entering that field.

It is submitted that the Court of Appeals too easily, and wrongly, assumed that the FCC's ruling was not a regulation of advertising.[35] This Court should review that issue.

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[35] The Commission itself had classified its ruling as falling under its "power to regulate advertising" (App. A, p. 43, n. 4) and noted "our ruling applies only to cigarette advertising . . ." (App. A, p. 77) and is a "ruling on cigarette advertising". (App. A, p. 78) The Court of Appeals also, in some parts of its opinion, recognized that the ruling was a "ruling on cigarette advertising". (App. B, p. 26a) Thus, the majority (1) stated that it was the alleged uniqueness of such advertising which purportedly justified the Commission's ruling (App. B, p. 27a, n. 63; App. B, p. 29a), and (2) rejected constitutional arguments based upon the First Amendment on the ground that regulation of advertising (*i.e.*, so-called "commercial" speech) was all that was involved. (App. B, pp. 34a-35a)

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 49

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

No. 48

NATIONAL ASSOCIATION OF BROADCASTERS and WTRF-TV, INC., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

No. 51

NATIONAL BROADCASTING COMPANY, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

No. [redacted] 47

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., P. LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

APPENDIX TO PETITIONS FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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No.

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THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., P. LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

APPENDIX TO PETITIONS FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX A

Opinions and Rulings of the Federal Communications Commission

(Reprinted From the Joint Appendix Filed in the Court of Appeals)

15 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

June 2, 1967

Television Station WCBS-TV
51 West 52 Street
New York, New York

Gentlemen:

This letter constitutes the Commission's ruling upon the complaint of Mr. John F. Banzhaf, III, against Station WCBS-TV, New York, N. Y. Mr. Banzhaf, by letter dated January 5, 1967, filed a fairness doctrine complaint, asserting that WCBS-TV, after having aired numerous commercial advertisements for cigarette manufacturers, has not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking."

Mr. Banzhaf's letter cites as examples three particular commercials over WCBS-TV which present the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life". Mr. Banzhaf, in his letter to you of December 1, 1966 requested free time be made available to "responsible groups" roughly approximate to that spent on the promotion of "the virtues and values of smoking".

Your responsive letter of December 30, 1966 cites programs which WCBS-TV has broadcast dealing with the effect of smoking on health, beginning in September 1962 and continuing to date. It cites six reports on this issue in its evening news programs since May 1966, five major reports by its Science Editor since September 1966 and five one minute messages, which advance the view that smoking is undesirable, broadcast without charge within the last few months for the American Cancer Society. The letter also refers to half hour and hour programs on smoking and health broadcast in 1962 and 1964. You take the position

that the above programs have provided contrasting viewpoints on this issue by responsible authorities, and therefore, that it is unnecessary to consider whether the "fairness doctrine" may be applied to commercial announcements solely aimed at selling products. You state your view that it may not.

In Mr. Banzhaf's complaint to the Commission, he asserts that the programs cited by you as showing compliance with the "fairness doctrine" are insufficient to offset the effects of paid advertisements broadcast daily for a total of five to ten minutes each broadcast day. He also states that the very point of his letters is to establish the applicability of the doctrine to cigarette advertisements.

16 We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

We reject, however, Mr. Banzhaf's claim that the time to be afforded, "roughly approximate" that devoted to the cigarette commercials. The fairness doctrine does not require "equal time" (see Ruling No. II C. 12, 29 F.R. 10419) and, equally important, a requirement of such "rough approximation" would, we think, be inconsistent with the Congressional direction in this field—the 1965 Cigarette Labeling and Advertising Act. The practical result of any

roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising. But in the 1965 Act Congress made clear that it did not favor such a "drastic" step, but rather wished to afford an opportunity to consider "the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package . . . [on the problem of] adequately alert [ing] the public to the potential hazard from smoking" (Sen. Rept. No. 195, 89th Cong., 1st Sess., p. 5). At the conclusion of a three year period (to end July 1, 1969), and upon the basis of reports from the Federal Trade Commission and the Department of Health, Education, and Welfare (HEW) and other pertinent sources, the Congress would then decide what further remedial action, if any, is appropriate. In the meantime, Congress has promoted extensive smoking education campaigns by appropriating substantial sums for HEW in this area. See P.L. 89-156, Title II, Public Health Service, Chronic Diseases and Health of the Aged.

Our action here, therefore, must be tailored so as to carry out the above Congressional purpose. We believe that it does. It requires a station which carries cigarette commercials to provide a significant amount of time for the other viewpoint, thus implementing the "smoking education campaigns" referred to as a basis for Congressional action in the 1965 Act. See Cigarette Labeling and Advertising Act; remarks of Senator Warren Magnuson, floor manager in the Senate of the bill which became that Act, Cong.
17 Rec. (Daily Edition) Jan. 16, 1967, p. S. 317, 319.

But this requirement will not preclude or curtail presentation by stations of cigarette advertising which they choose to carry.

A station might, for example, reasonably determine that the above noted responsibility would be discharged by pre-

senting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the American Cancer Society or HEW in this field. We stress, however, that in this, as in other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See Cullman Broadcasting Co., F.C.C. 63-849 (Sept. 18, 1963).

In this case, we note the WCBS-TV is aware of its responsibilities in this area, in light of the programming described in the third paragraph. While we have rejected Mr. Banzhaf's claim of "rough approximation of time", the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking. We note in this respect that, particularly in light of the recent American Cancer Society announcements, you appear to have a continuing program in this respect. The guidelines in the foregoing discussion are brought to your attention so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area.

By Direction of the Commission

Ben F. Waple
Secretary

814 FCC 67-1029
5063

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

RM-1170

In the Matter of

Television Station WCBS-TV New York, New York

Applicability of the Fairness Doctrine
to Cigarette Advertising

Memorandum Opinion and Order

Adopted September 8, 1967; Released September 13, 1967

By the Commission: Commissioners Loevinger and Johnson concurring and issuing statements; Commissioner Wadsworth absent.

1. The Commission has before it for consideration: a "Petition for Rulemaking" and a "Petition for Stay of Effectiveness of Application of Fairness Doctrine to Cigarette Advertising," filed on June 20, 1967 by the law firm of Smith, Pepper, Shack and L'Heureux on behalf of various broadcast clients; a letter, dated June 23, 1967, from Columbia Broadcasting System, Inc. (CBS), requesting reconsideration of a ruling in the Commission's letter of June 2, 1967 to television station WCBS-TV; a "Petition for Reconsideration" and a "Petition for Immediate Stay of Effectiveness Pending Reconsideration by the Commission," filed on July 3, 1967 by the National Association of Broadcasters (NAB); a letter from Association of National Advertisers, Inc., dated June 29, 1967, requesting reconsideration of the ruling; petitions for reconsideration, incorporating requests for stay, filed by The Tobacco Institute, Inc., *et al.* and WGN Continental Broadcasting Co., *et al.* on June 30, 1967 and July 3, 1967,

respectively; and petitions or requests for reconsideration filed on July 3 and 5, 1967 by American Broadcasting Companies, Inc. (ABC), National Broadcasting Company, Inc. (NBC), Storer Broadcasting Company, Griffin-Leake TV, Inc., *et al.*, the law firm of Dow, Lohnes and Albertson on behalf of 17 broadcast licensees, and the law firm of Pierson, Ball & Dowd on behalf of the licensees of 61 radio and television stations. A petition for reconsideration was filed on August 1, 1967 by the Maryland/District of Columbia/Delaware Broadcasters' Association; and a "Statement of Position by Federal Communications Bar Association" on July 27, 1967.[1] Requests for reconsideration have also been received from several Congressional sources.

A pleading in support of the Commission's ruling
815 has been filed by the complainant, John F. Banzhaf III; his pleading challenges the standing of the petitioners and many of the arguments advanced, and urges denial of the relief sought.[2] Petitioners seek rule making on, and reconsideration and rescission of, a ruling in the Commission's letter of June 2, 1967 to television Station WCBS-TV, New York City, that the Fairness Doctrine is applicable to cigarette advertising (FCC 67-641), and a stay of the effectiveness of the ruling pending action on their petitions.

2. Our ruling (FCC 67-641) was made on a complaint against Station WCBS-TV, New York, by Mr. John F. Banzhaf III, who asserted that this station, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking." Specifically, he noted three cigarette advertisements broadcast on November 24, 1966 over WCBS-TV

[1] In addition, the Commission has received various resolutions from state associations of broadcasters and numerous letters from the public.

[2] We do not find the arguments raised as to petitioners' standing persuasive.

which presented smoking as "socially acceptable and desirable, manly, and a necessary part of a rich full life." Attached to the complaint was a letter by Mr. Banzhaf to the station requesting that free time be made available to "responsible groups" roughly approximate to that spent on the promotion of the "virtues and values of smoking." There was also attached a reply to Mr. Banzhaf by WCBS-TV setting forth the programs which it had broadcast on the effect of smoking on health, taking the position that these programs provided contrasting viewpoints on this issue, and stating its view that the Fairness Doctrine may be inapplicable to commercial announcements solely aimed at selling products. In Mr. Banzhaf's complaint, he asserted that the WCBS-TV showing of compliance with the Fairness Doctrine was insufficient to offset the effects of advertisements broadcast daily for a total of five to ten minutes each broadcast day.

3. The Commission ruled that the Fairness Doctrine is applicable to cigarette advertisements, but rejected Mr. Banzhaf's claim that the time to be afforded roughly approximate that devoted to cigarette commercials. We held that a station which carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance—i.e., that however enjoyable, such smoking may be a hazard to the smoker's health. We stated that here, as in other areas under the Fairness Doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the facts of his situation; and that accordingly the initial judgment as to whether sufficient time is being allocated each week in this area by WCBS-TV is one for the licensee.

816 4. By a letter to the Commission dated June 23, 1967, CBS requests that the contents of its letter be treated as the comments of WCBS-TV on the complaint

and that the Commission reconsider its ruling on the basis of these comments. CBS does not request a stay of the effectiveness of the ruling, but does challenge the merits of the ruling.

5. In support of their requests for relief, other petitioners urge that the ruling has broad implications and will affect all licensees carrying cigarette advertising though they did not have an opportunity to be heard prior to its adoption. It is asserted that substantial doubts as to the validity of the ruling are presented by the various requests for reconsideration and other relief, and that licensees will not dare risk non-compliance pending action on these pleadings lest their non-compliance be raised at license renewal time. It is further asserted that licensees would suffer irreparable damage in the interim by temporarily adhering to the ruling because they would risk loss of substantial amounts of advertising revenue and compliance would disrupt station advertising policies as well as give rise to scheduling and production problems. Consequently, petitioners state, fairness and an equitable administration of the Fairness Doctrine call for a suspension of the effectiveness of the ruling pending action on the petitions for reconsideration and rule making.

6. We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS-TV and may necessitate a change in the operations of some. In view of the widespread interest in the ruling by persons who have not hitherto been heard, and since stay relief has been requested, we have decided to give expeditious consideration to the arguments made in all of the pleadings before us to determine whether anything has been advanced on the merits which would warrant reconsideration of our ruling, a stay of its effectiveness, or rule making in this area. The positions of the parties appear to be amply set forth in the pleadings on file, and we have given thorough consideration to the arguments made in reaching our decision. For the reasons set forth below,

it is the conclusion of this Commission that nothing has been advanced which would warrant reconsideration or a stay of our ruling or rule making. However, in the circumstances, we have decided for reasons of equity that the conduct of licensees (including WCBS-TV) in applying the Fairness Doctrine to cigarette advertising prior to the publication date of this Memorandum Opinion and Order (which we shall also mail to all broadcast licensees) will not be considered in connection with their applications for renewal of license; conduct subsequent to that date will receive consideration, in specific rulings where appropriate or at license renewal time.

817

I. Petitioners' Arguments on the Merits

7. The principal contentions presented on the merits of the ruling are: (A) that the Fairness Doctrine is itself violative of the First and Fifth Amendments to the United States Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (B) that the Fairness Doctrine, even if constitutional, applies only to programming in the nature of news, commentary on public issues or editorial opinion, and does not extend to advertising; (C) that the Commission is precluded from applying the Fairness Doctrine to cigarette advertising because Congress has preempted the field and the Commission's ruling is contrary to Congressional policy; (D) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose; (E) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health

hazard posed by smoking and the suggestion that a licensee might, *inter alia,* present a number of public service announcements of the American Cancer Society or the Department of Health, Education and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (F) that the ruling cannot logically be limited to cigarette advertising alone; (G) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (H) that the ruling is in any event procedurally invalid for failure to accord interested persons an opportunity to be heard prior to the issuance of a novel and unprecedented policy determination. We shall carefully examine each of these contentions below and set forth in full our reasons for concluding that they lack merit.

A. *Constitutionality of Fairness Doctrine*

8. Those parties claiming that the Fairness Doctrine is violative of the First and Fifth Amendments to
818 the Constitution incorporate by reference their comments to this effect in Docket No. 16574, *In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates.*[3] By a Memorandum Opinion and Order released on July 10, 1967 in that docket (FCC 67-795), the Commission rejected the contention as to the First Amendment. For the reasons and authorities there set forth, we adhere to that deter-

[3] This contention is made by the NAB, the law firm of Pierson, Ball and Dowd, and WGN Continental Broadcasting Co., et al. The petition for rule making filed by Smith & Pepper states that it does not address itself to the question of whether *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, Case No. 19,938 (C.A.D.C., June 13, 1967), is good law.

mination here.[4] The Fifth Amendment challenge was also rejected in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, Case No. 19,938 (C.A.D.C., decided June 13, 1967), and we see no valid distinction in the circumstances of this matter.[5]

819 B. *Scope of Fairness Doctrine*

9. In contending that the Fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, which was meant to apply only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising. It is further urged that no mention of advertising was made in the 1964 Fairness Primer, 29 F.R. 10415, and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it is asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting in the 1959 amendment of Section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a), limited the scope of the doctrine to programming of that nature since it

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[4] Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (see *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110-111; *Valentine* v. *Chrestenson*, 316 U.S. 52, 54; *Martin* v. *Struthers*, 319 U.S. 141, 142, note 1; *Beard* v. *Alexandria*, 341 U.S. 622, 641-643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to programming. See *Head* v. *Board of Examiners*, 374 U.S. 424, 436-431, 437-441 (advertising), and cf. *Farmers Union* v. *WDAY*, 360 U.S. 525, 529-530 (political broadcasts); *Henry* v. *Federal Communications Commission*, 302 F. 2d 191, 194 (C.A.D.C.), *cert. den.* 371 U.S. 821 (entertainment).

[5] Insofar as it is asserted that due process has not been accorded, we believe that our extensive consideration of the pleadings filed since the ruling meets the requirements of due process in view of the nature of the issue and the arguments relating thereto (see paras. 55-58, *infra*). The conduct of licensees prior to the publication of this Memorandum Opinion and Order will not be considered adversely when the question of renewal of license arises.

did not amend Section 317 of the Act to incorporate a similar provision. It follows, the parties state, that the present ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

10. We do not find these arguments persuasive. The Fairness Doctrine has its foundation in the obligation imposed on licensees by the Communications Act to operate in the public interest (see discussion, *infra*, par. 64), which includes the "basic policy of the 'standard of fairness'" and the "broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." H. Rept. No. 1069, 86th Cong., 1st Sess., p. 5; S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; Section 315(a); 1949 Report on Editorializing, 13 F.C.C. 1246, 1248-1249. That "one of the basic elements of any such operation" (13 F.C.C. at 1248) is a recognition by the licensee of "the right of the public to be informed" (13 F.C.C. at 1249) as to "opposing positions on the public issues of interest and importance in the community" (13 F.C.C. at 1258) when the licensee is presenting programming in the nature of news, commentary on public issues or editorial opinion, does not mean that the licensee is relieved of his statutory responsibility for advertising broadcast over his facilities or his over-all duty to operate in the public interest and to make a fair presentation of controversial issues of public importance in whatever context they may arise. Section 315(a); 1949 *Report on Editorializing*, 13 F.C.C. at 1257-1258. Moreover, the circumstance that Congress specifically incorporated in the Fairness Doctrine into the 1959 amendment to Section 315 to make it "crystal clear" that the programming exemptions from the equal time requirement of that section
820 did not exempt licensees "from objective presentation thereof in the public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's

statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy." S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; 105 Cong. Rec. 14439.[6] Most important, the amendment refers to the obligation imposed upon broadcast licensees ". . . *under this Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (emphasis supplied).

11. The Commission's present ruling that advertising falls within the public interest responsibilities of a licensee is not a novel or unprecedented policy determination. See concurring opinion of Mr. Justice Brennan in *Head* v. *Board of Examiners,* 374 U.S. 424, 437-441. This opinion sets out in detail the administrative and other pertinent history establishing the pattern of Commission regulation in this area. See par. 13, *infra.*

12. The Commission has always directed itself particularly to programming and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given
821 in letters from listeners, and which received a rebate on each prescription sold. *KFKB Broadcasting Association* v. *Federal Radio Commission,* 47 F. 2d 670, 671 (C.A.D.C.). The Radio Commission held, with judicial approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases

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[6] Given the background to the 1959 amendments (see *Red Lion Broadcasting Company* v. *Federal Communications Commission, supra*), we are unable to see any significance in the fact that Congress did not also amend Section 317 to incorporate the Fairness Doctrine expressly. In any event, as stated, the absence of a specific reference to the Fairness Doctrine in Section 317 does not show a lack of Commission authority under the general provisions of the Act.

his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." *Id.*, at 671-672. The Communications Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. *Farmers and Bankers Life Insurance Co.*, 2 F.C.C. 455, 457-459. The Commission stated that "[a] broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." 2 F.C.C. at 458. See also *WSBC, Inc.*, 2 F.C.C. 293, 294-296, and *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298 (both involving advertising of quack medicines by one not licensed to practice medicine). The Commission has also applied the Fairness Doctrine to products such as Krebiozen and to the health issues involved in Carlton Fredericks program, "Living Should be Fun." See 33 F.C.C. 101, 107 (1962).[7]

13. Mr. Justice Brennan, in his concurring opinion in the *Head* case, 374 U.S. at 439, noted that

> "... As early as 1928, for example, the General Counsel of the Radio Commission held that abuses in network cigarette advertising—while not a sufficient basis for revocation proceedings against an individual licensee—might on renewal militate against the requisite finding of broadcasting in the 'public interest.'"

The opinion also notes (n. 15) that

> "Shortly after the issuance of the General Counsel's opinion, the Chairman of the Federal Radio Commis-

[7] As further administrative background in this area, see In re petition of Sam Morris, 11 FCC 197 (1946), where the Commission indicated the applicapability of the Fairness Doctrine to advertising in certain situations.

sion was asked by Senator Dill during his appearance before the Senate Commerce Committee whether he thought the Commission had sufficient power 'through its power of regulation and its determination of public interest to handle objectionable advertising?' The
822 Chairman replied, 'I think so, Senator Dill, because we have had little trouble about it, even without direct power. * * *.'" *Hearings before Senate Committee on Interstate Commerce on S. 6,* 71st Cong., 1st Sess., pt. 6, p. 230.

See also *Hearings before Senate Committee on Interstate Commerce on S. 6,* 71st Cong., 1st and 2d Sess., pp. 88-89. The particular complaint leading to the General Counsel's opinion charged, *inter alia,* that "the object of this broadcasting is to transform 20,000,000 adolescent boys and girls into confirmed cigarette addicts by creating a vast child market for cigarettes in the United States," that "10,000,000 boys throughout the country are being viciously and deliberately misled by paid testimonials, secured from professional athletes, football coaches and others, definitely suggesting the use of cigarettes as an aid to physical prowess," that "the medical opinion of the country is being continuously misrepresented to support the health and medical claims made for cigarettes," that the specific claims made for a particular brand of cigarette advertised on the air are overwhelmingly opposed by established health and medical facts," and that "Such radio activities, the petitioner maintains, are clearly contrary to public interest, public welfare and public health." Opinion No. 32, 1928-1929 Opinions of the General Counsel, Federal Radio Commission, 77, at 78 (April 15, 1929). General Counsel Bethuel M. Webster, Jr. concluded that the "Commission may find, in view of this showing, that public interest, convenience, and necessity will not be served by further renewal of the licenses in question, in which case the matter will be set for hearing pursuant to Section 11, and peti-

tioner's prayer for general relief will be granted." *Id.* at 82.

14. In short, we believe that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined
823 at license renewal time (see 1960 Programming Policy Statement, 20 Pike and Fischer, Radio Regulation 1901, 1912-1913). It is our belief that the public interest standard and Fairness Doctrine embodied this principle from their inception. In any event, even assuming the contrary, we think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time. While the agency's position as to what the obligation to operate in the public interest requires for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette Labeling and Advertising Act (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education and Welfare pursuant to that Act, it is not an abuse of discretion for the Commission to decide now that a licensee who presents programming and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation

adequately to inform the public as to the possible hazard.[8] See *infra,* paragraphs 30-32. Nothing that is presented in the extensive pleadings filed in this matter convinces us that petitioners should prevail on their position to the contrary.

824 C. *Compatibility with the Cigarette Labeling Act*

15. Petitioners further urge that Congress in the Cigarette Labeling and Advertising Act of 1965 (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) preempted Federal, State and local activity to compel health warnings in cigarette advertising, and that the Commission's ruling is not only inconsistent with that policy but lies also in an area where Congress has withdrawn authority. On the basis of our analysis of the provisions of the Labeling Act and its legislative history, we agree that no Federal or State body could legally adopt regulatory measures which would require either a cessation of cigarette advertising or the inclusion of a health warning in the advertisement itself. We nevertheless believe, for the reasons set forth below, that our ruling that broadcast licensees presenting cigarette advertising must otherwise inform the public as to the potential health hazard, is not precluded by the Labeling Act and is entirely consistent with the Congressional decision to promote extensive smoking education campaigns.

16. The Cigarette Labeling Act states that:

> It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising

[8] It has long been recognized, of course, that "the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." *Pinellas Broadcasting Co.* v. *Federal Communications Commission,* 230 F. 2d 204, 206 (C.A.D.C.), *cert. den.,* 350 U.S. 1007.

with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

The Act thus requires the labeling of cigarette packages with the statement: "Caution: Cigarette Smoking may be Hazardous to Your Health." The Act also does the following: (1) makes it unlawful for any person to manufacture, import, or package for sale within the United States any cigarettes which do not bear the above-mentioned statement on the package. Violation of this requirement is made a misdemeanor subject to a fine of not more than $10,000. (Sections 4, 6); (2) prohibits the requirement of any other cautionary statement on the labeling of cigarettes under laws administered by any Federal, State or local authority (Section 5(a)), and prohibits, for three years, any requirement by any Federal, State, or local authority that cigarette advertising include a statement relating to smoking and health (Section 5(b)); (3) states that the
825 Federal Trade Commission has no authority to require any cautionary statement in any advertisement of cigarettes labeled in conformity with the Act, but otherwise neither limits nor expands the authority of the FTC with respect to the dissemination of false or misleading advertisements of cigarettes (Section 5(c)); (4) permits injunctions to be obtained to restrain violations of the Act, and provides an exemption for cigarettes manufactured

for export from the United States (Sections 7 and 8); and (5) requires two Federal agencies to transmit reports to Congress before July 1, 1967 and annually thereafter: (a) the Secretary of Health, Education, and Welfare concerning current information on the health consequences of smoking and recommendations for legislation and (b) the Federal Trade Commission concerning the effectiveness of cigarette advertising, current practices and methods of cigarette advertising and promotion, and recommendations for legislation.

16a. Section 5—the portion pre-empting Federal, State and local activity to compel health warnings in cigarette labeling and advertising—provides in subsection (b):

> No statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labeled in conformity with the provisions of this Act.

It is clear from the wording of this section that neither the F.C.C. nor the F.T.C. could require cigarette advertisements to contain statements of health warnings. However, this does not mean that the F.C.C. or the F.T.C. cannot regulate in other respects concerning smoking and health. The section does not read, as petitioners would have it, that no statement by others interested in informing the public of the potential hazard from smoking may be required "because of the advertising of any cigarette"—i.e., not in or adjacent to the advertising but at some other time period, by others or the licensee, because the advertising has presented but one face of this important issue to the public. Moreover, although the Senate debate on the Labeling Act is not wholly clear in this respect,[9] the House debate indicates that the F.T.C. is still free to regulate with respect to misleading or deceptive advertising concerning

[9] 111 Cong. Rec. 15597-15598 (1965).

smoking and health under Section 5 of the Federal Trade Commission Act.[10] For example, if an advertisement said that cigarette smoking was not a health hazard, the F.T.C. could act to prevent such advertising. The Chairman of the House Commerce Committee explained that the Labeling Act did not purport to change the present authority of the F.T.C., only to limit that authority with respect to compulsory inclusion of statements concerning smoking and health in cigarette labels and advertising.[11]

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See Section 5(c) of the Act. The F.C.C.'s regulatory authority was not discussed in the committee reports on the proposed legislation or in the legislative debates. Nevertheless the background and legislative history of the Labeling Act furnish some basis for judging what impact, if any, that Act has on the F.C.C.'s authority in this field, particularly under the Fairness Doctrine.

Legislative History

17. The pertinent background to the 1965 Act is set out in Appendix A. We turn here to the relevant legislative history. Prior to 1964 a number of bills had been introduced without enactment by Congress in an effort to compel cigarette manufacturers to acquaint the public in various fashions with the health hazards of smoking. With the Advisory Committee's Report as a catalyst, many bills were introduced during the Second Session of the 88th Congress embodying several approaches to acquaint the public with the hazards of smoking: (1) to require that cigarettes sold in interstate commerce be labeled with a health warning, and/or with a disclosure of nicotine and tar content (H.R. 4168; H.R. 7476; H.R. 9693); (2) to confer on the F.T.C. the power and duty to regulate advertising and labeling of cigarettes (H.R. 9655; H.R. 9657; H.R.

10 111 Cong. Rec. 16541-16544 (1965).

11 Remarks of Chairman Harris, 111 Cong. Rec. p. 16544 (1965).

9808; S. 2429); (3) to amend the Federal Food, Drug and Cosmetic Act so as to make that Act applicable to smoking (H.R. 5973; H.R. 9512); (4) to provide for informational and educational campaigns by HEW to acquaint the public with the health hazards involved in the use of cigarettes and to provide for continued research in this field (H.R. 9668; S. 2430); and (5) to enjoin all Government agencies, etc., from taking any action or pursuing any policy which encourages or promotes the public to buy or use cigarettes (S. 2430).

18. As a result of the submission of these bills, Chairman Harris conducted hearings from June 23, 1964 through July 1, 1964 before the House Commerce Committee concerning possible action by Congress. The purposes of the hearings were to review the scientific evidence of the causal link between smoking and cancer and, if Federal action was found to be required in the interest of public health, to determine what approach would be most desirable. Chairman Harris commented later that the closing days of that session of Congress had not permitted sufficient time for further hearings and for the preparation and consideration of carefully drawn legislation in this field. These hearings before the House Commerce Committee were the only hearings conducted on the subject of cigarette labeling and advertising by either side of Congress during the second session of the 88th Congress.

827 19. Legislative activity resumed in the first session of the 89th Congress with consideration of bills taking three basic approaches to the smoking health hazard problem: (1) to amend the Federal Food, Drug and Cosmetic Act to regulate smoking products (H.R. 2248); (2) to provide for a health warning and/or nicotine and tar content on the label of cigarette packages (S. 559; H.R. 3014; H.R. 4007; H.R. 7051; H.R. 4244); and (3) to give the F.T.C. the power and duty to regulate advertising and labeling of cigarettes (S. 547). Both the Senate and the

House Commerce Committees undertook hearings to determine the state of the medical evidence for and against the causal link between smoking and disease and to determine what Federal action, if any, should be required in the public interest. With regard to these questions, the Senate Committee concluded (S. Rept. No. 195, 89th Cong., 1st Sess., p. 3):

> While there remain a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.
>
> The Commerce Committee, therefore, concurs in the judgment that "appropriate remedial action" is warranted.

The House Committee was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's Report or the medical evidence elicited by its own hearings. However, it did conclude that Congressional action should be taken with regard to the relationship of smoking and health. H. Rept. No. 449, 89th Cong., 1st Sess., p. 3.

20. As petitioners point out, Congress in enacting the Cigarette Labeling Act was concerned about possible economic impact on the tobacco and broadcasting industries, as well as the potential health hazard to the public. The House Report states (*id.*, at p. 3):

828 The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by Congress after considering all facets of

the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States.

21. The compromise evolved by Congress was to require a health warning in labeling, but not in advertising, for an interim period pending a further Congressional determination as to whether extensive smoking education campaigns and industry self-discipline would render such a drastic step unnecessary. The Senate Report states (S. Rept. No. 195, 89th Cong., 1st Sess., p. 5):

> Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package, which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

The House Report similarly states that the Cigarette Advertising Code and the educational and informational programs of HEW in combination with the Labeling Act made it unnecessary to insert health warnings in cigarette advertising as proposed by the F.T.C. (H. Rept. No. 449,
829 89th Cong., 1st Sess., pp. 4, 5). The Labeling Act provides that the provisions which affect the regula-

tion of advertising shall terminate on July 1, 1969 (Section 10). The reason for specifying this termination date was the expectation of Congress that before that date, on the basis of all available information, including that contained in the reports to be submitted by HEW and F.T.C., it would re-examine the subject matter of the Labeling Act.

Conclusion

22. In light of the foregoing, it is our view that Section 5 of the Labeling Act was meant to preclude any requirement of a health warning in the advertising itself, as proposed by the F.T.C. rule (see par. 7, App. A), but there was no legislative intent otherwise to foreclose the use of radio, along with other educational media, as an effective means of informing the public to the potential hazard of smoking. The Fairness Doctrine has its reason for being in (1949 Report on Editorializing, 13 F.C.C. at 1249):

> • • • the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting. [Footnote omitted.]

We also cannot believe that Congress would have overturned so basic a tenet of communications law and policy in this area or that it would have withdrawn so fundamental a responsibility of the Commission without some express indication and explanation. See par. 30, *infra*. On the contrary we believe that for reasons developed below,

our action is entirely consistent with the "comprehensive Federal program . . ." (Section 2, Cigarette Labeling Act), since it will promote the "extensive education campaigns," which Congress noted and relied upon in reaching the policy judgment embodied in the Act (see par. 21, *supra*).

830 23. As stated, our ruling accords with and is tailored to the legislative policy embodied in the Labeling Act. In the first place, the ruling does not require a health warning in or adjacent to cigarette advertising—a matter coming within Section 5(b) of the "preemption" portion of the Act. Rather it leaves to the good faith, reasonable judgment of the licensee—upon the facts of his situation—the matters of the type of programming, the nature of the time to be afforded for the opposing viewpoint, and the amount of time to be allocated on a regular basis.

24. Second, our ruling does not preclude or curtail presentation by stations of cigarette advertising which they choose to carry (see also, paras. 48-54, *infra*). We rejected Mr. Banzhaf's claim that the time afforded for the opposing viewpoint should "roughly approximate" that devoted to cigarette advertising, not only because the Fairness Doctrine does not require "equal time" but also in the belief that this would be inconsistent with the Congressional direction in this field provided in the Labeling Act. For, we recognized that the "practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." We stressed that our action would be tailored so as to carry out the Congressional purpose, and we shall of course adhere to that guideline in implementation of the ruling.

25. Most important, we think that our ruling implements the smoking education campaigns referred to as a basis

for Congressional action in the Labeling Act (*supra*, par. 21). Congress itself has affirmatively promoted such educational efforts by appropriating $2 million for use by HEW in this direction. P.L. 89-156, Title II, Public Health Services, Chronic Diseases and Health of the Aged. As a consequence, HEW has established the National Clearinghouse for Smoking and Health. Its purposes are to collect, organize and disseminate information on smoking and health, to provide encouragement and support for state and local educational activities, and to conduct research into the behavioral nature of the smoking habit. The Public Health Service and others have acted to inform the public on smoking and health directly by sending lecturers across the United States to address local groups, distributing printed information to the public, and furnishing the broadcast media with spot announcements on smoking and health. The Public Health Service reported in January 1967 that it has distributed spot announcements to over 900 radio stations and is at present approaching individual television stations to obtain further coverage for its messages. The American Cancer Society reports that it has received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health.

26. The Public Health Service has also worked through local organizations to warn the public of the health hazards of smoking. It is in direct contact with a number of regional, state, or local inter-agency advisory committees on smoking and health, which have worked to stimulate community interest in thirty-five states. As a result of this stimulus and others, the medical societies of at least 18 states have made statements linking cigarette smoking with lung cancer and other health hazards and, in some cases, have undertaken organized activity to publicize the relationship of smoking and health. For example, the California Medical Association has recently

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undertaken a program urging individual doctors to acquaint their patients with the health hazards of smoking. Local and statewide civic groups have also started public education efforts.

27. The Public Health Service and the United States Children's Bureau have directed a special education campaign aimed at school age children. To date, school programs on smoking and health reach about 70 percent of the school children in the United States. Forty states have developed materials on smoking and health for children or plan to do so, and twenty-seven states have either held conferences on smoking and health or intend to do so. In September 1966 a nation-wide program to discourage smoking among 7th and 8th graders was launched by the National Congress of Parents and Teachers. This plan is being supported by the Public Health Service and is operating in 21 states.

28. The affected industries have renewed their efforts at self-regulation since the enactment of the Labeling Act. While there has been no change in the Cigarette Advertising Code of the cigarette manufacturers, they have sought and obtained F.T.C. approval to make factual advertising statements about tar and nicotine content. On March 25, 1966, the F.T.C. determined that a factual statement of the tar and nicotine content of the mainstream smoke from a cigarette would not be in violation of that Commission's 1955 Cigarette Advertising Guides or of any provision of the law administered by the Commission. However, no collateral statements (other than the factual statement of tar and nicotine content of cigarettes) suggesting the reduction or elimination of health hazards in smoking are allowed, and all these factual statements must be based upon a standardized testing technique.[12]

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12 New York Times, March 29, 1966, 53:6.

832 29. In October 1966 the Code Authority for the NAB issued the Cigarette Advertising Guidelines which they had announced during the 1965 Senate hearings would be forthcoming.[13] The main objectives of the guidelines are to restrict advertising appeals to youth and
833 statements concerning the health benefits of smoking. In January 1967, the Code Authority announced in a news release a slight change in the Television Code to strengthen its position as to appeals to youth. The Television Code, Section IX, General Advertising Standards, Par. 7, now reads:

> The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to youth that the use of cigarettes contributes to individual achievement, personal acceptance or is a habit worthy of imitation.

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13 *Text of the New Cigarette Advertising Guidelines*

Athletic Activity: A person who is or has been a prominent athlete shall not be used in a cigarette commercial. Cigarette commercials shall not depict persons participating in, or appearing to be participants in, sports or athletic activity requiring physical exertion.

Tar and Nicotine Statements: Factual statements of tar and nicotine content of cigarettes are subject to proper documentation. No statements or claims regarding benefits to health and well-being are acceptable.

Filters: Cigarette advertising shall not state that because of the presence of the filter or its construction the cigarette is beneficial to the health or well-being of the smoker.

Uniformed Individuals: Individuals in certain types of uniforms have a special appeal to youth. Therefore, such uniformed individuals as commercial pilots, firemen, the military and police officers shall not be used in cigarette advertising.

Premiums: Cigarette advertising shall not include references to offers of premiums which are primarily designed for youth.

Portrayal of Youth: Children or youth shall not appear in cigarette commercials in any manner, even though they are merely bystanders or part of the background. Cigarette advertising shall use individuals who both are and appear to be adults and who are shown in settings associated with adults.

30. Considering these affirmative efforts by Congress, federal, state and local public and private agencies, and the affected industries to educate the public as to the smoking health hazard and, particularly, to discourage youth from forming the habit, we are not persuaded by petitioners' argument that HEW and FTC have primary jurisdiction in this matter and that this Commission alone is precluded from following its traditional method of assuring that the public is adequately informed as to both sides of this controversial issue of public importance. Significantly, Congress was at pains to spell out what was preempted (Sections 5 (a) and (b), and specifically stated that except as is otherwise provided in subsections (a) and (b), "nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes . . . ." Similarly, we believe that there was no preclusion of FCC action, so long as such action is consonant with the "comprehensive Federal program . . ." (Section 2). As set forth in the prior discussion, we think that our responsibilities and policies under the Communications Act and our ruling herein are entirely consonant with the Congressional objectives in this area. Indeed, it is our belief that the Commission could not properly follow any other course in this matter. For this Commission, like other administrative agencies, was "not commissioned to effectuate the policies" of the Communications Act "so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern S.S. Co.* v. *Labor Board*, 316 U.S. 31, 47.

834 31. One further contention of petitioners on this aspect warrants discussion. It is asserted that we are precluded from issuing our ruling because the Commission declined to make any recommendation to Congress in connection with the Labeling Act legislation on the ground that it had not yet studied the matter, and because the Commission still has not conducted any study or proceeding on the smoking hazard issue. The circumstances giving rise to the contention are as follows: Prior to the issuance of the Advisory Committee Report, the Commission stated in a "by direction" letter, concerning possible rule making with regard to advertising, promoting or encouraging cigarette smoking among young people, that action would be inappropriate before the Advisory Committee's Report was available and (Letter to Senator Magnuson, F.C.C. 63-1033):

> The Commission's concern is limited, of course, to advertising in the broadcast field. Other agencies may have authority to take comprehensive and effective action, if necessary or appropriate. It is, we think, obviously more desirable to treat such an important matter, if possible, on a broad, across-the-board basis rather than in piece-meal fashion.

When the Advisory Committee's Report was issued and the F.T.C. had announced its rule making proceeding concerning cigarette labeling and advertising (see App. A), the Commission on January 1964 initiated plans to coordinate its efforts with the comprehensive regulation which the F.T.C. had proposed and with activities of other interested agencies. FCC Letter to F.T.C. Chairman Dixon, FCC 64-29 (January 15, 1964). On February 7, 1964, in "by direction" letters to Congressman Leonard Farbstein (FCC64-100) and his constituent, Mr. Sidney Katz (FCC64-99), then Chairman Henry answered a request to institute rule making proceedings to ban cigarette advertising by reiterating the policy statement quoted above and noting

that the Commission would await the results of the F.T.C. rule making proceeding before acting in this area. When asked to comment on S.2429, 88th Cong., and S.547 and S.559, 89th Cong., the Commission reiterated its policy that it favored "across-the-board treatment of the matter of regulating cigarette advertising and that since the F.T.C. had undertaken a comprehensive remedial regulatory plan, the F.C.C. had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area. Comments on S.2429, 88th Cong., FCC 64-730; Comments on S.559 and S.547, FCC 65-96.

835 32. We do not believe that these facts preclude us, as a matter of law or of policy, from issuing our ruling in the present circumstances. First, as shown above, circumstances have changed. The F.T.C., while proceeding in other respects consistent with the 1965 Act, is not, of course, undertaking its comprehensive regulatory plan to require a health hazard announcement to accompany each cigarette commercial. Second, as also shown above, our ruling is consistent with and particularly suited to promoting the "across-the-board" objective of Congress to treat this matter through extensive campaigns to educate the public as to the hazards of smoking. Third, we did not defer to the F.T.C. as a matter of legal authority but rather of policy. The Commission is not precluded from changing its policies so long as any new policy adopted is, like our ruling, reasonable in the circumstances. See *supra*, par. 14 and footnote 8. And, finally, studies by this Commission are clearly not required to evaluate the various factors and public interest considerations posed by the issue of smoking and health, particularly since Congress declared and pursued its policy of promoting smoking education campaigns. In this connection, see also the discussion below (paras. 33-34 and 60-62).

33. On July 12, 1967, HEW submitted its Report to Congress, which includes the Surgeon General's Report on

Current Information on the Health Consequences of Smoking. Upon the basis of more than 2000 research studies that have been completed and reported in the biomedical literature throughout the world in the intervening three and one-half years since the Advisory Committee's Report, the Surgeon General states that there is no evidence calling into question the conclusions of the 1964 Report and, on the contrary, the research studies published since 1964 have strengthened those conclusions. The Surgeon General summarizes the present state of knowledge of these health consequences, in the judgment of the Public Health Service, as follows (Surgeon General's Report on the Health Consequences of Smoking—1967, p. 2):

1. Cigarette smokers have substantially higher death rates and disability than their non-smoking counterparts in the population. This means that cigarette smokers tend to die at earlier ages and experience more days of disability than comparable non-smokers.

2. A substantial portion of earlier deaths and excess disability would not have occurred if those affected had never smoked.

836 3. If it were not for cigarette smoking, practically none of the earlier deaths from lung cancer would have occurred; nor a substantial portion of the earlier deaths from chronic bronchopulmonary diseases (commonly diagnosed as chronic bronchitis or pulmonary emphysema or both); nor a portion of the earlier deaths of cardiovascular origin. Excess disability from chronic pulmonary and cardiovascular diseases would also be less.

4. Cessation or appreciable reduction of cigarette smoking could delay or avert a substantial portion of deaths which occur from lung cancer, a substantial portion of the earlier deaths and excess disability from chronic bronchopulmonary diseases, and a portion of the earlier deaths and excess disability of cardiovascular origin.

In releasing the Report, HEW Secretary John W. Gardner stated (HEW Press Release for July 13, 1967):

> The relationship between smoking and health has obvious and serious implications for individuals who now smoke and for young people who may be thinking of starting to smoke. From the standpoint of public policy and social concern, this association constitutes one of the most critical health problems today.
>
> It is perfectly obvious that if we are going to reduce the unnecessary death and illness now caused by cigarette smoking, three things must take place: There must be a reduction in the number of people who smoke, a number which now constitutes 42 percent of our population. We must do everything we can to encourage young people not to start smoking; at present, half of our young people are cigarette smokers by the time they are 18. And finally, we must work toward the development of a less hazardous cigarette and, concurrently, help develop a climate of opinion which will encourage acceptance if such a cigarette is developed.

837 34. The June 30, 1967 Report of the FTC to Congress pursuant to the Labeling Act stressed the importance of educating teenagers before they start smoking since the use of cigarettes is so strongly habit forming (Report, p. 8). The FTC Report states (p. 13) that whether intentional or fortuitous, teenagers appear to be a prime target for televised cigarette advertising and that the "average American teenager sees more cigarette commercials on network television than does the average American" (p. 25); " '87.9% of teenage boys' and '89.5% of teenage girls hear radio on the average day' " (p. 13). The Report comments (p. 24):

> In making a decision on whether to start smoking, youngsters especially have a right to know that once they start, they may never be able to stop. A viewer of cigarette commercials and advertisements would never hear of this aspect of smoking.

The concluding paragraph of the F.T.C. Report states (p. 29):

> Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. Cigarette advertisements continue to appear on programs watched and heard repeatedly by million (sic) of teenagers. Today, teenagers are constantly exposed to an endless barrage of subtle messages that cigarette smoking increases popularity, makes one more masculine or attractive to the opposite sex, enhances one's social poise, etc. To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story.

35. This Commission agrees. Considering all of the foregoing, we believe that our ruling is within our statutory authority and not precluded by the Congressional policy embodied in the Labeling Act—that rather it implements that policy. We also think it is imperative in the public interest that we exercise our discretion now without delay for further studies.

838 D. *The Argument as to Blanket Ruling*

36. Petitioners further contend that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. But this argument misconceives the nature of the controversial

issue. Mr. Banzhaf's complaint was that the cigarette commercials over WCBS-TV presented the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life." Our ruling points out that:

> The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Petitioners point to no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke, and we find it difficult to conceive of one.

37. Further, we are unable to accept the argument that in the absence of any express health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. The June 30, 1967 F.T.C. Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15-16). The F.T.C. states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk
839 (ibid.).[14] The Report supports this conclusion, more than adequately in our view, by a comprehensive

[14] The FTC Report states (p. 17) that an estimated 58% of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do.

review and analysis of the advertising submitted by a large number of cigarette companies and monitored by the Commission (FTC Report, pp. 15-23). Numerous examples are given of the "satisfaction" theme (pp. 15-16)[15]; the "associative" theme (pp. 16-17)[16]; "appeals directed to
840 vanity" (pp. 17-18)[17]; subtle methods of "assuaging

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15 The Report states that portrayal of satisfaction, particularly oral satisfaction, continues to be an important element of cigarette advertising. Taste or flavor of cigarettes is most often described in terms of "mildness" (Tareyton filters, Montclair menthols, Camel regulars, Carlton filters, Lucky Strike filters, Pall Mall filters, and Chesterfield kings); "smoothness" (Tareyton filters, Pall Mall kings, Newport menthols, and Lucky Strike menthols); "real", "true", "rich" or "great" tobacco flavor or taste (Raleigh filters, Newport menthols, Viceroy filters, Salem menthols, and Philip Morris filters). Invariably, the taste of menthol cigarettes is either cool, fresh and/or refreshing ("coolest flavor," Lucky Strike Green; "forest-fresh taste . . . cooler tasting," Pall Mall; "as fresh as you like it," Philip Morris; "most refreshing coolness," Kool; "fresher," Newport; "fresh menthol flavor," Camel; "Springtime fresh" and "refreshes your taste," Salem; "a full, fresh taste," Chesterfield). The FTC comments (p. 16): "The impression forms that "menthol taste" relieves smoking irritation, albeit 'smoking irritation' is never expressly stated.

16 The Report states (p. 16) that associating cigarette smoking with persons, activities, places and things likely to be admired, respected or emulated, i.e., endowing cigarette smoking with a positive associative image, continues unabated in current advertising. For example, outdoor activity of an athletic nature such as sailboating "suggests that the smoking depicted in the foreground, if not conducive to rousingly good health, is certainly not incompatible with it" (FTC Rept., p. 17). In addition, social events abound in which the viewer is brought into the "wholesome, jolly company of cigarette smokers" (*ibid.*). E.g., "singing aboard the old paddle wheel steamer (with Pall Mall kings); * * * picknicking (with Camel filters); and coffee klatching (with Winston filters)."

17 The Report gives as examples of appeals to vanity (pp. 17-18):
"*Be discriminating:* 'Particular about taste . . . I'm particular' (Pall Mall Kings); 'They like the style of this cigarette' (Parliament filters). *Be exclusive:* * * * 'exclusive plastic pack' (Philip Morris filters and menthols); 'There's no other cigarette' (Lark filters). * * * 'the smokers who know' (Camel filters). *Be a success:* 'tastes rich, good, rewarding' (Viceroy filters); 'This man was born rich' (Camel filters). *Be a social success:* "Come up to the taste of Kool' (Kool menthols); 'find something better' (Old Gold filters). *Be independent:* 'break away from the crowd . . . the cigarette for independent people' (Old Gold filters); 'stands out from the crowd' (Salem methols). *Associate with important people:* 'Chairmen are never bored with them' (Benson & Hedges filters); the charter boat skipper who has 'got a good ship, a good crew and a good breeze' (Camel regulars)."

anxiety'' about any health hazard (pp. 19-21)[18]; the ''loyalty'' theme (pp. 15-16)[19]; and the ''bonus'' theme, which includes promoting longer cigarettes at pop-
841 ular prices as well as coupon promotions (pp. 22-23).[20] We note also the FTC's comment [21] (Report, p. 18):

> There is in all of the array of positive images an element of escape from actuality. Some cigarette advertising transcends mere image association and projects its own separate and unique world. Examples include ''Salem Country,'' a land in which romantic couples romp and preen through shifting, sylvan set-

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18 The Report states that as a result of extensive promotion during 1957-1959, the belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes (p. 19). Comparatively overt attempts to allay health anxieties have been made by manufacturers of charcoal filter cigarettes by pictorial details of filters creating the impression that they prevent passage of tars and gaseous effusions (Tareyton, Lucky Strike, Tennyson, Cold Harbor, King Sano, Tempo, Duke and Lark). Rept., p. 20. Other ''very low key'' advertising enhances the impression of relative safety by adding suitable adjectives to the word ''filter'': ''recessed filters'' (Benson & Hedges and Parliaments), ''white filters'' (Yorks), ''menthol filters'' (Springs) and filters with coconut shell charcoal'' (Philip Morris). *Ibid.*

19 See Report (p. 22). Underlying these ''loyalty'' theme examples is, of course, the promise that the particular cigarette gives great satisfaction (e.g., ''Change to Winston and change for good'').

20 The Report states (p. 23): ''The purchase of Raleigh cigarettes has long been rewarded with coupons redeemable for goods. Today, Belair menthols, Old Gold filters, York filters, Spring menthols, and Domino filters also carry coupons redeemable for goods. Menthol and filter Chesterfields and Philip Morrises carry coupons redeemable for more cigarettes.'' The Report also gives examples of 100 millimeter cigarette advertising (Benson & Hedges, Lucky Strike, Winston, and Pall Mall), and states (*ibid.*): ''With a definite relationship having been established between amount of cigarette smoking and incidence of lung cancer and other diseases, a fitting motto for the 100-millimeter cigarette campaign might be 'extra health hazard at no extra cost'.'' (footnotes omitted).

21 While we have, as petitioners point out, distinguished between explicit and implicit raising of controversial issues in broadcast material where health was not involved (e.g., atheists and agnostics versus the broadcast of religious services), we do not regard those cases as pertinent here in view of the nature of the controversial issue.

tings; the "Night People," whose post evening encounters can lead to smoking Parliament filters; and "Marlboro Country," where there daily unfolds the simple male heroic virtues of the "Old West." Worry over health has been vanished from these Shangri-las.

38. It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. We see no inequity in the circumstance that cigarette adver-
842 tisers are precluded by various codes from making affirmative health claims in the advertising programming.[22] The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials. And, finally, we fail to see any merit in the argument that no controversial issue of public importance can be presented where a lawful business is advertising a

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22 We recognize also (as set forth in para. 29 above and Appendix A) that the tobacco and broadcasting industries have endeavored in their codes to prescribe cigarette advertising standards aimed at reducing the appeal to youth. But the conclusions of the FTC Report (par. 37 above) and the statistics and other matters set forth in paras. 33-34 and 60-61 would seem to indicate that the standards are either not being followed or are not effective in discouraging new teenage smoking. Moreover, it occurs to us that teenagers on the verge of adulthood may be more influenced by a portrayal of the attractiveness and desirability of adult conduct than by one connoting childhood or youthful behavior. As the FTC Report notes (p. 8): "'They tend to view cigarette smoking as a visible mark of maturity, a passport to adulthood. Because the health dangers of cigarette smoking are not brought home to them in an effective and meaningful way, many teenagers take up the smoking habit.'"

lawful product.[23] While an unlawful business advertising an unlawful product over the air waves might well raise some controversial issue of public importance, we do not regard that element as essential. The claim that no controversial issue of public importance is presented by cigarette advertising is neither realistic nor persuasive.

843 E. *The Contention as to a Substitution of "Commission Fiat" for Licensee Judgment*

39. Petitioners also argue that the ruling, by requiring that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by cigarette smoking and by suggesting that a licensee might, among other things, present a number of public service announcements of the American Cancer Society or HEW, will cause a debasement of the Fairness Doctrine generally and a substitution of Commission fiat for licensee judgment. CBS, in particular, noting that commercials are by nature repetitive and continuous, urges that treating all cigarette commercials as presentations of one side of a controversial issue will raise a question as to whether any one program or program series—however enlightening and informative as to all points of view—can constitute an adequate opportunity for response. Asserting that inevitably the licensee's only recourse will be a series of health hazard spot announcements, CBS states that broadcast treatment of cigarette health issues should not be reduced to a contest of opposing spot announcements, endlessly repeated

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23 NBC, in urging that licensees could reasonably and in good faith conclude that no controversial issue of public importance is presented by cigarette advertising, notes that the F.T.C. advertising guides permit presentation of enjoyment since they state:

> "Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or enjoyment."

Our ruling is consistent. It, too, does not in any way prohibit the presentation of enjoyment in cigarette commercials. It merely requires the licensee adequately to inform the public of the potential hazard, as found by Congress and Government reports, entailed in commencing or continuing this habit.

long after any member of the public has understood and acted if he wished. It further asserts that such an approach makes no sense in the area of news and public affairs programming and that the net result of our ruling will be to convert licensee responsibility in such areas to presentations very similar to product advertising.

40. Like CBS, we recognize that the presentation of one side of a controversial issue of public importance in advertising programming poses a situation which differs from that usually pertaining to the presentation of controversial issues in news and public affairs programming. In the latter instance, the issue may arise only once, or a few times, or several times in a relatively short time period because of factors such as timeliness. But as CBS points out, commercials are by nature "repetitive and continuous;" the complaint here went to advertisements broadcast daily for a total of five to ten minutes each broadcast day. We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine under the Act's basic policy of the "standard of fairness" (*supra*, par. 10). For, while the Fairness Doctrine does not contemplate "equal time", if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. This
844 consideration is not limited to advertising. For example, if one side of a controversial issue of public importance were regularly presented in a daily network program, compliance with the Fairness Doctrine would require something more than an occasional presentation of the other side of the issue during the course of the year.

41. Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death.

In the circumstances, we think that the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. As indicated in our ruling, and in light of the considerations set forth in paras. 33-34 and 60-61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis (e.g., each week).

42. We note that, contrary to CBS' position, the repetition of short communications has apparently been regarded by the broadcasting and advertising industries and other interested organizations as an effective means of reaching the listener or viewer. But in any event, there is nothing in our ruling which compels a licensee to treat the issue through presentation of spot messages. In our ruling we stated: "A station might, for example, reasonably determine that the above noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the Cancer Society or HEW in this field." This example does not on its face indicate that the opposing viewpoint should be presented solely or principally through spot announcements, and it was not intended as a "Commission fiat" as to the manner of compliance with the Fair-
845 ness Doctrine.[24] We stressed in the ruling, and here

[24] As set forth in par. 25, prior to our ruling the American Cancer Society received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health. Moreover, the Public Health Service reported in January 1967 that it had distributed spot announcements to over 900 radio stations and was then approaching individual television stations to obtain further coverage for its messages. The example we gave merely took cognizance of the fact that such material is available to licensees if, in their judgment, its use would facilitate compliance with their obligations under the Fairness Doctrine. We thought it desirable to note its availability particularly for the small station with limited resources, which might have difficulty in preparing its own program material dealing with this issue.

strongly emphasize again, that "in this, as in other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See *Cullman Broadcasting Co.*, F.C.C. 63-849 (Sept. 18, 1963)."

43. In other words, we agree with CBS that the "question of whether a licensee is responsibly complying with the fairness doctrine cannot be resolved by *per se* guidelines, ratios or other rigid rules." A licensee which has just presented a very lengthy program on this issue obviously might reach a different judgment as to what his obligation was in this respect for the next week or so. But as stated, the carriage of the normally substantial amount of weekly commercials raises a concomitant responsibility to be met over relatively the same period of time. Further, in these circumstances, while a one-to-one ratio is ruled out by considerations of the legislative history of the Cigarette Labelling Act, the licensee's obligation is just as clearly not met by an occasional program a few times a year or by some appropriate announcements once or twice a week. We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials. We do not see why licensees, proceeding in good faith, should experience any real difficulty in reasonably discharging that responsibility nor why, in view of the nature of the issue—the public's health, they would seek to fulfill that obligation in a niggardly fashion, designed to raise problems or complaints. In sum, we have not usurped licensee judgment as to the type of programming or the amount or nature of the time to be afforded, but rather have left these matters to the good faith, reasonable judg-

ment of the licensee based on his evaluation of the facts of his particular case.[25]

846 F. *Effect of the Ruling on the Advertising of Products Other Than Cigarettes*

44. Petitioners further assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broad-scale effect on broadcast operations and the presentation of advertising by radio generally. They state that very little in society is uncontroversial and, since many products are subject to one form of controversy or other, an appeal to the Commission by a vocal minority is all that is needed to classify a subject as controversial and of public importance. They further claim that if governmental and private reports on the possible hazard of a product are a sufficient basis for the cigarette ruling, the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles and even common table salt. We do not find this "parade of horribles" argument impressive.

45. We stressed in our ruling that it was "limited to this product—cigarettes," stating further in this connection:

> Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Con-

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[25] It is also argued that the licensees may simply substitute cigarette health messages for other public service announcements now being carried. The duty of a station carrying cigarette commercials to inform the public as to the hazards of smoking stems directly from the fact that its facilities have been used to promote the use of this product found by the Congress and Governmental reports to be so potentially hazardous to health; its responsibility is therefore the same as in the case of any other fairness situation. It thus has a duty to present the other side, over and beyond what a licensee decides in other respects to present in order to serve the best interests of his area. We therefore do not believe that a licensee would or should adopt a pattern of operation which he does not adjudge to serve fully the needs and interests of his public.

gressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that the normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular product as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Our ruling does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) governmental and private reports and Congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

847 46. The products to which petitioners refer do not present a comparable situation. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from "normal use" of automobiles in the interest of public safety; rather, the emphasis is on increased safety features in the manufacture of automobiles and increased care by drivers. Moreover, we know of no widespread contention by governmental or private authorities that the "normal use" of any of the other products cited by petitioners poses a serious health hazard to millions of persons who otherwise enjoy good health.

47. We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by

Congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising.

G. *The Claim as to Adverse Financial Impact Upon the Broadcasting and Tobacco Industries*

48. Petitioners further assert that the ruling will seriously undermine the commercial structure of broadcasting, cause a substantial reduction in or the elimination of cigarette advertising to the severe detriment of these stations and their ability to serve the public interest, require a major change in the operation of broadcast stations by necessitating the acquisition and presentation of new program material and the keeping of additional records to document compliance with the Fairness Doctrine, limit the ability of cigarette manufacturers and advertisers to obtain advertising time on broadcast media, and adversely affect the sale of cigarettes, all of which will impose an unlawful burden on interstate commerce and conflict with the Congressional intent underlying the Cigarette Labeling Act.

848 49. The contention that our ruling will seriously undermine the commercial structure of broadcasting is pressed principally by the Association of National Advertisers, Inc., an association composed of leading manufacturers and service concerns that use advertising, seven

of whom market cigarettes. Their concern appears to rest principally on the fear that the ruling will be extended to many other products which are subject to controversy in one form or another. However, as set forth in the proceeding section of this opinion (*supra*, paras. 44-47), we believe that this fear is groundless. The only real question here is the impact of our ruling on cigarette advertising on broadcast media and the sale of cigarettes.

50. We have no reason to think, and petitioners have proffered nothing concrete in support of their claim, that the ruling will cause any substantial reduction in or the elimination of cigarette advertising on broadcast media or adversely affect the ability of broadcast licensees to serve the public interest. As we have stated, we shall tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry.

51. Nor do we think it realistic to assume that the requirement will cause cigarette advertisers and manufacturers to turn to other advertising media. The attractiveness of the broadcast media, particularly television, as a means of effectively reaching the vast majority of the American public with advertising, as well as other, messages is without equal.[26] We find it difficult to believe that cigarette manufacturers and advertisers would abandon or make substantially less use of a medium of this nature merely because our ruling may require an increase in the programming on the smoking-health issue which broadcast licensees are already presenting in the exercise of their

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[26] The FTC Report states (p. 10) that more of the money spent for cigarette advertising in the year 1966 was spent on television advertising than on all other media combined (66.6 percent in 1966). The Report also states (*ibid.*) that "in 1966, cigarette advertising accounted for approximately 7.2% of total television advertising expenditures."

judgment under the Fairness Doctrine and pursuant
849 to their obligation to operate in the public interest.[27] Rather, particularly in light of the consideration set forth above (par. 50), we are not persuaded that the effect of our ruling on the amount of cigarette advertising presented on broadcast media will be significant.[28]

52. We also fail to see how the ruling would require any major change in the operation of broadcast stations. In complying generally with the Fairness Doctrine in their overall broadcast operations, broadcast licensees are required to afford reasonable opportunity for the presentation of the other side of controversial issues of public importance when they choose to present one side, and to document their efforts upon complaint. Our rules require the keeping of program logs (See, e.g., §§ 73.111 and 73.112; see also Section 303(j) of the Communications Act), and we are sure that licensees in the conduct of their business affairs presently keep full accounts as to advertising matters. Thus, we think that this particular controversial issue can be handled by licensees in a manner similar to their established practices in this area.[29]

53. There is nothing in our ruling which would preclude or curtail the ability of cigarette manufacturers to obtain advertising time on broadcast media. Licensees remain free to present such cigarette advertising as they choose. Conceivably, some licensees, in view of the mounting public

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27 In this connection, we note that many stations and the television networks (e.g., CBS's efforts as detailed in this case) have given coverage to the smoking-health issue and that they also continue to air numerous cigarette commercials.

28 Certainly, there is no reason to anticipate that any such minimal impact could have any substantial adverse effect upon the ability of broadcast stations to serve the public interest. Cf. also FTC Report of June 30, 1967 at p. 10.

29 We note that WCBS-TV apparently had no difficulty in ascertaining what programs that station had broadcast on this issue in response to Mr. Banzhaf's complaint.

concern as to the potential health hazard of cigarette smoking, might voluntarily decide to curtail or refrain from cigarette advertising broadcasts in the public interest. But that is appropriately a matter for licensee judgment as to how to conduct broadcast operations to serve the public interest, and not a requirement of our ruling. Under Section 3(h) of the Communications Act, broadcasters are not common carriers and they cannot be compelled to present advertising which they do not wish to present. Moreover, cigarette manufacturers clearly have no right to insist that a broadcast licensee, who is willing to present cigarette advertising, present it in a manner that does not comport with his statutory obligation to operate in the public interest. Nor does a cigarette manufacturer have any legal right to complain that the use of radio to inform the public as to the potential health hazard of cigarette smoking may lead to some decline in cigarette sales or slow down the present trend of rising cigarette sales (FTC Report, pp. 4-7). Indeed, that is the very purpose of the educational efforts which Congress has directed HEW to undertake.

54. In sum, we see no merit to the contention that our ruling will lead to severe curtailment or possible elimination of cigarette advertising, or have a serious economic impact on the broadcasting industry, contrary to the intent of Congress in the Labeling Act. The ruling properly effectuates the responsibilities of broadcast licensees and this Commission under the Communications Act. There is no unlawful burden on interstate commerce nor conflict with Congressional intent in, or the provisions of, the Labeling Act.

H. *The Procedural Contention*

55. Finally, petitioners urge that the ruling is procedurally invalid because it effects an important and unprecedented change of policy which will affect all licensees

and it was adopted without affording WCBS-TV, broadcast licensees generally and other interested persons an opportunity to be heard. CBS, in particular, asserts that this was a departure from the Commission's procedure of advising a licensee of a fairness complaint and requesting its comments (Fairness Primer, F.C.C. Public Notice of July 1, 1964, 29 F.R. 10415, 10416, cited with approval in the *Red Lion* case, *supra,* par. 8). CBS requests that the contents of its letter be treated as its comments on
851 Mr. Banzhaf's complaint, and that we reconsider the ruling on the basis of such comments.[30]

56. We have granted this request of CBS and have carefully considered its comments in determining that reconsideration is not warranted by the arguments contained in its letter. Our omission to seek the comments of WCBS-TV initially was occasioned by our view that Mr. Banzhaf's complaint, which enclosed his request to WCBS-TV and the reply of that station, adequately set forth the facts of the case and the positions of the parties. Since WCBS-TV has a continuing policy of presenting the smoking-health hazard controversy and asserted only its position that the Fairness Doctrine does not apply to advertising, our letter of June 2, 1967 to that station had two purposes: One, to apprise WCBS-TV of the Commission's view that the Fairness Doctrine does apply to cigarette advertising, as a matter of law and policy, and second, to bring to the station's attention our view that a sufficient amount of time must be allocated, usually each week, for the

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[30] NBC notes that the Commission did not have before it the text of the three commercials Mr. Banzhaf referred to as examples. It has attached to its comments the texts of three advertisements and states that two of them appear to be those mentioned in the complaint and the third is probably the other. NBC further states: "They may show 'attractive' people 'enjoying' themselves while smoking cigarettes, but surely that does not constitute the expression of a viewpoint on whether smoking is a hazard to the smoker's health." For the reasons stated in para. 38 above, we do not think that the text of the particular advertisements was necessary to our ruling or to our decision on the requests for reconsideration.

opposing viewpoint so that WCBS-TV could appro-
852 priately exercise its licensee judgment in connection with its continuing program. As stated in par. 6, *supra*, the effectiveness of the June 2nd ruling will not be the basis for action against any licensee, including WCBS-TV, until publication of this Memorandum Opinion and Order in the Federal Register. In the circumstances, and particularly the fact that we have fully considered the comments submitted by CBS on reconsideration, we conclude that WCBS-TV has not been prejudiced by the procedures followed in this matter.

57. It is true that other interested persons were not accorded an opportunity to be heard prior to the ruling. It is not the Commission's normal procedure or usual practice to accord the public in general an opportunity to be heard with respect to fairness complaints against a particular licensee, even though the complaint may involve an important issue of policy (see, e.g., *Cullman Broadcasting Company*, FCC 63-849; *Times Mirror Broadcasting Co.*, 24 R.R. 404 and 407 (1962)). We thus followed long established procedures in this respect. In any event, we have now heard at length from the three television networks, numerous individual broadcast licensees, the NAB, and representatives of the advertising and tobacco industries. We have given extensive consideration to the arguments raised in support of their positions, and have found them without merit. Moreover, the ruling is not effective as to any broadcast licensee until publication of this opinion in the Federal Register. In the circumstances, we conclude that petitioners have been adequately heard and have suffered no prejudice.

58. Further, we are unable to conclude that any useful purpose would be served by affording petitioners a further opportunity for written comment or oral argument. The viewpoints of petitioners on the legal and policy issues are fully and amply set forth in the pleadings already filed, and nothing has been presented which would indicate

the need or desirability of further study or proceedings; thus we are not persuaded that any public purpose would be served by initiating rule making in this area, as requested by the law firm of Smith, Pepper, Shack and L'Heureux. We note that the petition for rule making does not propose the adoption of any rules, but only the provision of a forum for consideration of the legal and policy arguments urged by petitioners and discussed herein. We do not think that a rule making proceeding is either needed or appropriate for their resolution.[31]

853 59. And, finally, we point out that we could not in any event conclude that stay relief would be warranted pending any such further proceedings. This is not only because we believe that petitioners have not shown any substantial likelihood of ultimately prevailing on the merits of their position, either before this Commission or the courts, but also because the public interest would require denial of such relief on injury grounds. We have already set forth the basis for our belief that compliance with the ruling will not cause any substantial adverse impact on the broadcasting or advertising industries. We have not been shown that any irreparable injury will flow to petitioners. In any event, in view of the strong public interest in adequately informing the public, and particularly teenagers, as to the health hazard involved in the cigarette habit which broadcast facilities are encouraging them to adopt and continue, we think that any injury to the affected industries is outweighed by the danger of irreparable injury to the public. Indeed, if our ruling will contribute to the avoidance of one untimely

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31 As set forth in par. 43 above, we agree with the CBS position that licensee responsibilities under the Fairness Doctrine, in this as in other areas, should not be subject to *per se* guidelines, ratios or other rigid rules prescribed by the Commission. Accordingly, we would not undertake rule making to prescribe such standards in the absence of some compelling showing leading us to revise our present judgment (see paragraph 43) and to conclude that rule making in this particular area would be appropriate and would serve a useful purpose.

death, the public interest would not be served by any delay in its effectiveness.

60. In connection with this latter point, we have taken into account the further studies which have been undertaken since the Advisory Committee Report by persons competent in this field. Most important, of course, is the recent HEW Report of July 12, 1967 (already discussed in par. 33 and since confirmed and amplified in its Report of August , 1967). We shall therefore note here other pertinent studies. In February 1966 Dr. E. Cuyler Hammond's study for the National Cancer Institute made the first large scale survey of women cigarette smokers. His study showed that such women's death rate from heart disease and lung cancer were twice that of non-smokers.[32] In May 1966 Dr. Green of Harvard University reported experiments with rabbits proving cigarette smoking can cause many lung and throat ailments.[33] Roswell Memorial Institute announced in August 1966 a report finding filter tips of several cigarette brands ineffective in screening out harmful tars and nicotine. This report acknowledged that some filters were better than others, but asserts
854 that none protects smokers.[34] A study by the Public Health Service and the American Cancer Society reported in October 1966 that a five year study of Seventh Day Adventists in California, comparing death rates of 11,071 male Adventists who do not smoke and the general male California population, showed one-sixth as many lung cancer deaths and one-third as many deaths from all respiratory diseases among Adventists as among the total male population.[35] Also in October 1966, a Louisiana State University five-year study, financed partly by the Tobacco Research Council, reported findings of a relationship be-

[32] New York Times, February 23, 1966, 41:8.

[33] New York Times, May 2, 1966, 39:1.

[34] New York Times, August 30, 1966, 1:7.

[35] New York Times, October 12, 1966, 54:1.

tween cigarette smoking and hardening of the arteries in the heart.[36] Just recently, in a formal report to the President, it was stated by Dr. Kenneth M. Endicott, Chief of the National Cancer Institute, that "lung cancer—which will kill more than 50,000 Americans this year—can be brought under control because it is clearly caused by environmental factors—chiefly cigarettes." The President was also advised that "lung cancer has reached epidemic levels in men and may soon do so in women."[37]

61. As stated in our ruling, of most serious concern to the Commission are statistics as to the correlative rise in cigarette consumption and teenage smoking. In January 1966 the Department of Agriculture in a public report entitled, "Tobacco Situation", announced that 1965 had been a record year for cigarette consumption.[38] The reason given by the Surgeon General for the increase was new smokers, not the increased use of tobacco by the then-current smokers.[39] In July 1966 Surgeon General Stewart reported, based on American Cancer Society and Public Health Service surveys, that one-half of American teenagers are regular smokers by age eighteen, despite two and one-half years of intensive educational efforts.[40] In October 1966 the Rand Youth Poll, conducted by the Youth Research Institute, released findings that teenagers smoke ten million cigarettes per week, that 53 percent of all 16-19 year olds are smokers, and that this represents a rise of 4 percent in this age group during the almost three year period since the Advisory Committee's Report.[41] In November 1966 the American Cancer Society noted a six-year

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[36] New York Times, October 22, 1966, 20:2.

[37] The Washington Post, July 22, 1967, 2:1.

[38] New York Times, January 2, 1966, IV, 7:1.

[39] New York Times, January 11, 1966, 9:1.

[40] New York Times, July 17, 1966, IV, 10:1.

[41] Advertising Age, October 31, 1966.

study by Dr. E. Cuyler Hammond showing a marked drop in cigarette smoking among older people and a rise
855 in consumption by young people.[42] In December 1966 the Agriculture Department announced that Americans had once again set a new record for total consumption of cigarettes per year.[43] In light of the statistics concerning teenage smoking, this increase in consumption appears correlated to the increase in population which occurs through the increase in youthful persons.

62. We wish to make it clear that this Commission is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue. We have cited the reports in question because they establish (i) that here is a most substantial controversial issue of public importance, which must be fairly aired to the American people, and (ii) that because of the seriousness of the issue to the health of the people, a stay is patently inconsistent with the public interest. We recognize that there are countering efforts and arguments put forth particularly by the tobacco industry; there are also new and continuing developments in this field. See Hearings before the Consumer Subcommittee of the Senate Commerce Committee to review progress being made toward development and marketing of a less hazardous cigarette. We have not gone into detail on these matters, because they do not alter the two crucial findings set forth above.

63. As stated, this Commission agrees with the crucial point set forth in the concluding paragraph of the recent F.T.C. Report (see par. 34). In view of the Congressional action, the Government and private reports, we conclude that a stay of our action would be contrary to the public interest. Licensees must therefore abide by the ruling, or seek judicial review of it (see *Red Lion Broadcasting Company* v. *F.C.C. supra*). (Even in the event of such

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42 New York Times, November 3, 1966, 41:1.

43 New York Times, December 31, 1966, 4:6.

review, the ruling remains effective, absent entry of a Court stay.)

II *Conclusions*

64. There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" (§ 315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labelling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee
856 who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

65. In light of all the foregoing, we conclude and find:

a. The ruling as to the applicability of the Fairness Doctrine to cigarette advertising is within the Commission's legal authority and discretion, and is in the public interest.

b. Petitioners have made no showing which warrants reconsideration and withdrawal of the ruling or the institution of rule making in this area.

c. Petitioners have made no showing that relief, except as indicated in par. 6 above, is warranted or in the public interest; on the contrary, the grant of stay relief would be likely to cause irreparable harm to the public.

ACCORDINGLY, IT IS ORDERED, That the petitions and requests for reconsideration, rule making, and stay listed in paragraph 1 of this Memorandum Opinion and Order ARE DENIED, except to the extent that relief is granted herein pending publication of this Memorandum Opinion and Order in the Federal Register.

IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order SHALL BE MAILED to all broadcast licensees of the Commission.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

Attachment

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Appendix A
Background to 1965 Cigarette Labelling Act

1. On January 11, 1964 the Report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." After the Report was issued, many groups private and public acted to provide this "remedial action."

* See attached statements of Commissioners Loevinger and Johnson.

(a) *The Tobacco and Broadcasting Industries*

2. Soon after the Advisory Committee's Report, the tobacco and broadcasting industries reacted with voluntary measures to control the content of cigarette advertising. In January 1964 the Television Code Review Board and the Television Board of Directors of the NAB recommended and approved specific amendments to the Television Code. The amendments prohibited some types of cigarette advertising directed at young people and health claims in cigarette advertising.[1] In June 1964 similar amendments were approved for the Radio Code.[2] These Code amendments were motivated by the Advisory
858 Committee's Report. In the words of the Television Code Review Board (Hearings, Senate Commerce Committee on S. 559 and S. 547, 89th Cong., 1st Sess., pt. 1, p. 591):

> The board recognizes the burden of responsibility the report imposes on all television licensees in the area of cigarette advertising. Specifically, the board is concerned with the potential of cigarette advertising to give the false impression that cigarette smoking promotes health or physical well-being.

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1 *Television Code, Section IV, Program Standards, Paragraph 12:*

Care should be exercised so that cigarette smoking will not be depicted in a manner to impress the youth of our country as a desirable habit worthy of imitation.

Television Code, Section IX, General Advertising Standards, Paragraph 7:

The advertising of cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country.

2 *Radio Code I, Program Standards, Section H. 13:*

The use of cigarettes shall not be presented in a manner to impress the youth of our country that it is a desirable habit worthy of imitation in that it contributes to health, individual achievement, or social acceptance.

Radio Code, Advertising Standards, Section C (g):

The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to the youth of our country that the use of cigarettes contributes to individual achievement, personal acceptance, or is a habit worthy of imitation.

The Code Authority also made clear that regulation initiated by the cigarette manufacturers was what they envisaged. Thus the Authority provided that it would delay the issuance of general guidelines (interpreting the code amendments) which would assist advertisers and code subscribers in adhering to the television code restrictions, pending its determination of the implementation and effectiveness of the tobacco industry's self-regulation. *Id.*, at p. 592.

3. In April 1964 the major cigarette companies announced their agreement and adherence to a cigarette advertising code to impose standards and enforcement procedures for the self-regulation of cigarette advertising. The code provided advertising standards which would be applied by an independent administrator who would survey the advertising and labeling of cigarettes in the United States, with the power to levy fines for any advertising or labeling which does not conform to the industry code standards. These standards are basically of three types. The first prohibits many types of cigarette advertising specifically directed at persons under 21 years of age. Another prohibits health claims, except in certain limited circumstances. The third type prohibits suggestions that smoking is essential to social prominence, distinction, success, or sexual attraction. Robert B. Meyner, the former Governor of New Jersey, is the first and current administrator for the code. In evaluating the effect of the code on cigarette advertising, Mr. Meyner said in a Senate hearing (id., at p. 568) that the character of cigarette advertising had been altered as a result of his enforcement of the code.[3]

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[3] However, we note the following exchange between Code Administrator Meyner and Senator Bass (id., at p. 581):

"*Senator Bass:* * * * don't you believe that the industry itself, with you as the administrator, don't you believe that you are capable of protecting the health of the American public as far as advertising of cigarettes is concerned?

"Code Administrator Meyner: I think you describe a responsibility that is greater than is set forth in the code. As the code sets it forth, I am trying to accept that responsibility . . ."

859 (b) *HEW and Private Health Agencies*

4. The Department of Health, Education and Welfare (HEW) also took action after the Advisory Committee's Report. On February 18, 1964, the Surgeon General, Luther Terry, convened a meeting of four voluntary agencies to discuss with them and other health agencies means of implementing the recommendations contained in the Advisory Committee Report. This meeting eventually resulted in the establishment of the National Interagency Council on Smoking and Health on July 9, 1965. The purposes of the Council are threefold: "(1) to use its professional talents to bring to the nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking, (2) to encourage, support and assist National, State and local smoking and health programs, and (3) to generate and coordinate public interest and action related to this area of health." The membership of the Council includes thirteen private agencies and three Federal Government agencies (United States Public Health Service, United States Office of Education, and United States Children's Bureau).

5. In 1964, the Public Health Service, which strongly endorsed the conclusions of the Advisory Committee's Report, awarded 10 grants and contracts to support demonstrations and projects to design effective methods of reaching various population groups with the facts about smoking. The comprehensive educational campaigns, however, which the Public Health Service desired to start had to await appropriations forthcoming from the 89th Congress. The President's Commission of Heart Disease, Cancer and Stroke recommended an appropriation of $10 million to educate the public on the health hazards of smoking and to provide a network of control clinics to assist those who desire to give up smoking. Two million dollars were forthcoming in the fall of 1965.

(c) *The Federal Trade Commission*

6. As early as September, 1955 the Federal Trade Commission (FTC) had promulgated Cigarette Advertising Guides which, among other things, prohibited representations in cigarette advertising or labeling which refer to either the presence or absence of any physical effects from cigarette smoking, or which made unsubstantiated claims respecting nicotine, tars or other components of cigarette smoke, or which in any other respect contain implications concerning the health consequences of smoking cigarettes or any advertised brand (F.T.C. Ann. Rept., 1960, p. 82). In 1960 the F.T.C. obtained agreement from leading cigarette manufacturers to eliminate unsubstantiated claims of nicotine and tar content (*Ibid.*).

7. Shortly after the issuance of the Advisory Committee's Report the F.T.C., on January 18, 1964, initiated a Trade Regulation rule making proceeding concerning the advertising and labeling of cigarettes. On June 22, 1964, after examining the advertising, labeling and other promotional practices in the cigarette industry, the F.T.C. concluded that cigarette manufacturers should be required to make an affirmative disclosure of the potential hazard from smoking in labeling and advertising (29 F.R. 8325). The basis for its conclusion was twofold. First, the F.T.C. found that the consensus of medical and scientific opinion was that cigarette smoking is a significant cause of certain grave diseases and contributes to the overall death rate. Second, the F.T.C. found that methods by which cigarettes had been and were being sold to the consuming public—by means of labeling and advertising which fails to disclose the health hazards of cigarette smoking—were deceptive and unfair to consumers under settled legal principles governing truth and fairness in advertising. The rule would have required that each cigarette package bear a warning statement by January 1, 1965. Also, if the warnings on the package together with such voluntary advertising reforms as the industry might have undertaken in

the interim, had failed to change the circumstances leading to the F.T.C.'s findings, the rule would have then required, in addition, warnings in all cigarette advertising by July 1, 1965.

8. On September 3, 1964, at the request of Chairman Harris of the House Commerce Committee, the F.T.C. extended the effective date of the rule for both packaging and advertising warnings to July 1, 1965 (29 F.R. 15570). Chairman Harris stated that he had requested such action because testimony which he had received during his Committee's Hearings in June and July, 1964 indicated that the validity of the trade regulation rule would be challenged in the courts, that judicial review could delay the enforcement of the labeling requirements for a considerable period of time, and that the enactment of legislation in this area by the Congress could very well eliminate this delay. The F.T.C. rule never went into effect because Congress enacted the Cigarette Labeling Act.

861 **Concurring Opinion of Commissioner Lee Loevinger**

In the Matter of Cigarette Advertising Ruling

* * * *

I concur with great doubt and reluctance in the Commission ruling that broadcast licensees presenting cigarette advertising must also present warnings of the health hazards of cigarette smoking. I concur because the result seems to me to be socially and morally right. I have doubts that the action is procedurally and substantively consistent with controlling legal rules. I am reluctant because of concern that this action may represent a subjugation of judgment to sentiment. Briefly these are my views.

Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smok-

ing is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of government agencies, and by Congressional reports and statute. 15 USC sec. 1331 et seq. The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probabilistic. See Loevinger, Science and Legal Thinking, 25 Fed. Bar J. 153 (Spring 1965). Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. In an ordinary civil case or administrative proceeding a mere preponderance of the evidence is sufficient to carry the day. The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt. This is the basic premise of my position, as well as of the Commission position despite a rather feeble disclaimer that the Commission is not passing judgment on this issue. (par. 62)

However, a burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in a regulatory agency nor provides a sound legal guide to action. The instant proceeding illustrates the point.

The Commission here was so eager to take its present position that it acted on a complaint against CBS without giving notice to CBS, without affording CBS the opportunity to comment or submit a statement to the Commission directed to the issues under consideration, and without even bothering to secure or examine the text of the advertisements in question. Surprising though it may seem to those unfamiliar with administrative agencies, the Commission was not aware of these irregularities at the time of the initial ruling, and how they occurred is more significant as a study of administrative

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efficiency than as an issue of due process. It is enough to say that were the issue before us now merely the validity of the original letter to CBS these procedural defects would plainly invalidate the action.

However, what the Commission is doing now is issuing a prospective, legislative-type rule relating to cigarette advertising and broadcasting. CBS has been entirely exonerated from any imputation of unfairness in its broadcasting regarding cigarettes. That ends the proceeding so far as CBS is concerned; so the absence of due process in handling that complaint is no longer significant. In its present action the Commission is exercising its quasi-legislative authority to make a prospective rule. It is acting on the material that has been submitted to it since the original letter to CBS, so it has before it a variety of differing views from many interested parties. I think it would be preferable to have oral argument on the proposed rule to give the Commission the advantage of the interchange and confrontation between advocates of opposing views, and to permit the exploration of issues by direct questioning. But the refusal to hold such oral argument is not fatal and does not preclude legislative-type action.

Despite the reiterated certainty of the Commission opinion, doubts remain as to the legal authority of the Commission. Repetitious reference to the "public interest" as establishing whatever conclusion is contended for is no more than question-begging. The "public interest" is a judgment encompassing whatever the person making the judgment deems to be socially desirable. See dissenting opinion in Regulation of CATV Systems, 6 FCC2d 309, 330, at 335 et seq. (1967); Loevinger, Regulation and Competition as Alternatives, 11 Antitrust Bulletin 101, 129 et seq. (1966); Schubert, The Public Interest (1960). The Commission believes, and I concur, that it is socially desirable to discourage, rather than encourage, smoking by people, especially young people.

But the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e. "in the public interest"). On the contrary, it has been established by Congress with a limited jurisdiction and can act only within the power delegated to it by Congress, which means that it cannot act without some definite statutory basis.

The Commission opinion rests the present action on the Fairness Doctrine. This is a rule that broadcast licensees must afford reasonable opportunity for a discussion of conflicting views on issues of public importance. This principle was first developed on the basis of the statutory licensing power as to broadcasters, Editorializing by Broad-
863 cast Licensees, 13 FCC 1246 (1949), and was recognized by reference in a 1959 amendment to section 315. 47 USC sec. 315. The context of both sources refers to "news" and the basic Commission opinion also refers to "commentary" and "discussion of public issues". Neither contains the slightest suggestion that the principle has anything to do with advertising, and that conclusion is most dubious.

Further, I am concerned that extension of the Fairness Doctrine to advertising is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable. No matter what the Commission now says about the distinction between cigarette advertising and other types of advertising, it is establishing the principle that the Fairness Doctrine applies to commercial advertising, as distinguished from paid political broadcasting. The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (par. 46), the "normal use" of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids. The Com-

mission will also find itself embarrassed when, as will surely happen, the cigarette companies demand time from some broadcaster who refuses to carry cigarette advertising but presents "public service messages" warning against the dangers of cigarette smoking. Having declared this to be a "controversial issue of public importance", the Commission will be bound to require that the viewpoints of those manufacturing and selling cigarettes are afforded access to broadcasting facilities.

The Commission opinion does contain findings that might support the result reached. Paragraph 37 finds that cigarette advertising expressly represents smoking as desirable and implicitly represents that it involves "relative safety" or "relatively little risk". This finding is corroborated by common experience and by scientific investigation. See Preston, Logic and Illogic in the Advertising Process, 44 Journalism Q. 231 (Summer 1967). In view of the clear weight of scientific evidence and official findings on this subject, this means that cigarette advertising constitutes both implicit misrepresentation and concealment of a material fact, if the health hazards are not disclosed by the seller. It is elementary law that the supplier of a chattel is bound to disclose its latent dangers to prospective users. Restatement of the Law, Torts 2nd, sec. 388. There is sound statutory and precedential authority for Commission action to prevent false representations on the broadcasting media. 18 USC sec. 1343; KWK Radio, Inc., 34 FCC 1039 (1963), 111 AppDC 144, 337 F2d 540 (1964), cert. den. 380 US 910 (1965); Loevinger, The Issues in Program Regulation. 20 FCBA J 3 (1966).

864 The normal remedy for such misrepresentation or concealment would be either to forbid the advertising altogether or to require that it carry adequate disclosure of the material facts. There are two reasons precluding such Commission action. First, the Commission has no authority over advertisers as such. Second, the 1965 Cigarette Labeling Act apparently forbids such action.

The first reason is easily surmounted. The Commission has held that a broadcast licensee must take reasonable measures to prevent the use of his licensed facilities for public deception. KWK Radio, Inc., supra. The application of this principle to the present situation suggests a means of achieving the result reached here within the limits of statutory authority and without doing violence to the Fairness Doctrine. The second reason is more difficult.

The Commission opinion recognizes the Cigarette Labeling Act as a substantial argument against the present action, since it devotes a large part of the discussion to it. (pars. 15 through 35 and Appendix A). By reading the terms of the Act very literally and the presumed purposes of the Act very loosely, the opinion concludes that the present ruling is not precluded by the Act but rather implements the policy of the Act. The opinion offers a mass of detail in support of this conclusion, but a review of the relevant points casts some doubt. In several messages to Congress prior to passage of legislation on this subject and during consideration of such legislation, the FCC stated that its authority is limited to the broadcasting field and that it believed that cigarette advertising should be regulated on a "broad, across-the-board basis". (par. 31). After receiving several such messages from the Commission, Congress in 1965 passed an act expressly stating: "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, * * *" 15 USC sec. 1331. This was clearly the "broad, across-the-board" regulation which the FCC had suggested, and Congress surely was warranted in assuming that the FCC would not undertake to exercise its limited jurisdiction in a "piecemeal" attack upon the problem.

Nevertheless, the Commission opinion argues that FCC action is not precluded for several reasons. The opinion says that conditions have changed because the FTC is not

undertaking the comprehensive regulatory plan which it formerly proposed. (par. 32). But the reason for this is that the FTC plan was expressly forbidden by statute, and thus the only change in circumstance is the passage of the statute which limits, rather than extends, administrative authority to act in the field. The opinion also concludes that the terms of the Cigarette Labeling Act do not prohibit the present ruling because the Act refers only to statements made "in advertising" and not to statements made "because of the advertising" of cigarettes. (par. 16a, 23). However, the Act prescribes the form of health warning that is required on cigarette packages and explicitly provides that no other statement relating to health and smoking shall be required on cigarette packages or in cigarette advertising. If the Act is read as literally as the Commission opinion construes it, then it does not preclude the total prohibition of cigarette advertising, either altogether or in the broadcasting media. The opinion states that this would be inconsistent with the Act (par. 15) although there is no specific provision of the Act relating to this, any more than there is a specific provision relating to statements to be required "because of" cigarette advertising. The Commission opinion does not explain why the Act is construed to permit one remedy but not another for misleading advertising, when neither is explicitly covered. Despite the profusion of detail and the length of the discussion the opinion does not come to grips with the issue posed by the Cigarette Labeling Act. The real reason for the Commission's present action is that during the last several years the Commission has changed its "policy"—that is, its collective opinion—on this subject and now believes that it should take whatever action it can take to combat the health hazard of smoking, especially by young people who are likely to be influenced by the broadcast media.

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It seems to me that the construction of the Cigarette Labeling Act attempted in the Commission opinion is

strained and unconvincing. However, the basic difficulty is that Congress was obviously ambivalent on this subject and that there is no unequivocally clear Congressional intent to be derived from the Act or its history. It was a compromise between conflicting viewpoints which still have spokesmen who are heard in Congress.

I am as persuaded as the Commission majority and its draftsmen that cigarette smoking is hazardous and injurious to the health of smokers and extremely hazardous and injurious to the health of those who start smoking while young. Therefore I think it desirable that all legal and practical steps be taken to discourage smoking. I have serious doubts that the action taken now by the Commission is legally sound or practically effective. I think that if we spent less effort and space in proclaiming the righteousness of our purposes and objectives and more in careful and rigorous analysis of our procedures and of our legal jurisdiction and authority, and attempted greater specification of the scope and application of our ruling, we would be more convincing and more effective.

866 Consequently, I am reluctant to concur because this ruling seems to be the result of sentiment rather than conviction. It is based on a strong feeling that the public, especially the younger members of the public, should be protected against enticement to smoke cigarettes, rather than upon a well reasoned conclusion that this is an effective means of achieving that objective and that this ruling is soundly based on legal authority. My opinion cannot change the result, so all I can do is indicate the difficulties I see in this approach to the subject and the reasons that I have doubts, while confessing candidly that I put doubts aside and join, albeit reluctantly, in voting for the ruling here because of a strong feeling that suggesting cigarette smoking to young people, in the light of present knowledge, is something very close to wickedness.

867 **Fairness and Cigarette Advertising**

[In the Matter of Television Station WCBS-TV. . . .]

Concurring Opinion of Commissioner Nicholas Johnson

I join the Commission's decision to apply the Fairness Doctrine to the use of television and radio broadcasting to promote cigarette smoking. In view of Commissioner Loevinger's concurring opinion, however, I believe some brief remarks are appropriate.

With admirable honesty, Commissioner Loevinger has confessed to "doubts and reluctance" about our cigarette ruling. The issues he raises are provocative and significant. They touch on concerns which are, I believe, widely shared by members of the public. They inspire qualms about a case of landmark importance. I consider these doubts unwarranted.

Commissioner Loevinger does not state flatly that he thinks the ruling unlawful. But he does cast grave doubt on its validity, for his dismissal of a number of arguments against the Commission's position displays something less than full enthusiasm. For this reason, I feel obligated to set forth the simple logic behind my support for the decision.

The decision takes as its major premise a factual assertion which is so trivial as to be beyond cavil. Advertising
868 messages are part—an important and substantial part—of the information put before the public by television and radio broadcasting. Roughly one-third of radio's hour is spot commercials. As such, advertising messages should no more be granted automatic immunity from considerations of fairness than any other category of advocacy. If an advertisement takes a position on an issue that is "controversial" and of "public importance" then fairness—whether as a matter of Section 315, FCC regulations, or common decency—requires that an opportunity be granted to ventilate opposing views. Com-

munications Act of 1934, as amended, 47 U.S.C. § 315(a)(4) (1964). Federal Communications Commission, Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).

The Commission's minor premise seems equally hard to question. The issue of whether people ought to smoke cigarettes is a "controversial" issue, and it is one of "public importance." It has been recognized as such by Congress, the Executive Branch, the Federal Trade Commission as well as the FCC, the scientific and educational community, and the mass media. Millions of Americans smoke. Commissioner Loevinger agrees with the by now quite impressive evidence that they thereby incur grave risks of impairing their health and shortening their lives.
869 Broadcasters licensed by this Commission to serve the public interest devote significant amounts of their prime time to encouraging Americans to incur those risks. Given this set of circumstances, it is the minimum obligation of this Commission to see to it that a fair opportunity exists to present the other view: the warnings of those responsible citizens who believe cigarette smoking to be a dangerous and insidious habit.

Commissioner Loevinger does not explicitly dispute this line of reasoning. But he cautions against such an interpretation of the Fairness Doctrine by advancing what lawyers call a "slippery slope" argument. If the Commission brands cigarette advertisements controversial issues of public importance, he says, virtually all advertising will be covered by the logic of that decision. No one will know where to draw the line. Now, it is certainly true that it is no easy matter to decide what is and what is not a controversial issue of public importance. But that difficulty is one with which the Commission must live, *whenever* it confronts a fairness case. The fact that this particular case happens to involve paid commercial announcements does not make it unique in that respect. The slippery

slope argument states, in essence, that the logic of this decision, however justified on the facts before us, could be extended to other, more questionable, cases. Of course, this is right. This decision *could* be extended to other situations. But the fact is that all the hypothetical cases brandished by Commissioner Loevinger *are* more questionable than this one. By drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began.

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Finally, Commissioner Loevinger broaches the argument that Congress may have intended to preclude FCC regulation of cigarette advertising when it passed the Cigarette Labeling Act. With all respect, I consider such a sweeping intrepretation of that statute (which Commissioner Loevinger himself seems disinclined to accept) altogether misguided. It seems to me to reflect a very limited view of the relationship between particular Congressional actions and administrative agencies charged with enforcing established public policies of great significance.

This Commission has few, if any, responsibilities to the people of America greater than its duty to ensure that its licensees act consistently with the dictates of the Fairness Doctrine. That doctrine ensures that the most powerful medium of mass communication in our society does not stifle competition in the market place of ideas. Had the Congress and this Commission not written this doctrine into statutory and regulatory prescription, early in the history of the Communications Act of 1934, the Supreme Court might well have felt obligated to make the requirements of fairness a matter of constitutional law. For fairness plainly deals with issues of constitutional dimension.

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In view of the stature of the Fairness Doctrine, we would be underestimating our obligations as members of this

Commission if we concluded that the Cigarette Labeling Act tied our hands in the present case. I agree with the Commission that our action here is entirely consistent with the regulatory design created by that Act. But even if I shared Commissioner Loevinger's conclusion that the Act is ambiguous, it would not alter my view of this issue. Elemental principles of public law dictate that forces within the legislature cannot override a major national policy, unless they persuade a majority of the legislature to inhibit the application of that policy with clarity if not explicitly. In plain political terms, if there was "ambivalence" it means that a majority of Congress did *not* state an intention to immunize the advocacy of cigarette smoking from the requirements of the Fairness Doctrine. Thus, the Commission's obligation to apply that doctrine according to its inherent logic remains in force.

In conclusion, I would like briefly to express my personal regret at the seeming reluctance of some broad-
872 casters to accept the spirit of the fairness doctrine and this ruling. There is no social force more powerful than broadcasting today. If popular support is to be sustained for industry programming relatively unfettered by governmental restraint—which I encourage—the broadcasters must not only act responsibly but appear to act responsibly. Nothing contributes more to the appearance as well as the reality of responsible broadcasting than the Fairness Doctrine, and the FCC's enforcement of that doctrine. The broadcaster need not withstand alone both the charge that he has been unfair and that he has been unilaterally irresponsible in the self-evaluation of others' charges of his unfairness. He can point to the FCC, its procedures for evaluating such complaints, and its judgments on his behalf. Indeed, if the Fairness Doctrine and procedures did not exist I would think the broadcasters would be the first to urge their creation.

Note that, for a variety of reasons, the FCC has not banned cigarette advertising from broadcasting. Our ac-

tion today simply requires broadcasters—public licensees charged with operating "in the public interest"—to afford opportunity for fair response to the appeals of cigarette commercials. It is a mild form of regulation. It will have little, if any, impact on the advertising revenues of station owners and networks. It will increase the amount of public service time for which they may take credit.

873 Unfortunately, it will probably also do little to brake the still-climbing rate of cigarette consumption by Americans, especially our young people—who see, on the average, at least one television program every day sustained by commercials associating cigarette smoking with adulthood and other goals of youth. FTC Commissioner Elman has estimated that some 300,000 Americans die prematurely each year because of their affection for cigarettes. Given these facts I should think broadcasters would want to give far more serious consideration than they have to a voluntary ban on the carriage of cigarette advertisements.

For, once again, it is the appearance as well as the reality that moves men's souls. And, unfortunately from the standpoint of the broadcasters' relations with their public, broadcasting's encouragement of cigarette consumption is an issue wrapped in profits as well as propriety—indeed, roughly $200 million of advertising revenues a year. For, whether or not the judgment be warranted, association with profitable enterprise dependent upon the promotion of disease, death, dismemberment or degradation of one's fellow man—especially children—has historically been viewed in most human societies with even less charity than the senseless criminal act which produces the same end.

874 It is true that $200 million is not an insignificant amount of money voluntarily to forego. But, especially if its loss is ultimately inevitable anyway, it may be far cheaper in the long run to gain the goodwill of voluntary forebearance than to risk forever tainting the good name of American broadcasting.

882 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 67-1074
5284

September 21, 1967

IN REPLY REFER TO:
3300

Mr. Thomas J. Dougherty
Assistant Secretary
Metromedia, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

In re: Applicability of the Fairness Doctrine to Cigarette Advertising (RM-1170)

Dear Mr. Dougherty:

This is in response to your letter of September 15, 1967, seeking clarification of one aspect of the Commission's recent ruling on the applicability of the Fairness Doctrine to cigarette advertising (FCC 67-1029). Specifically, you inquire whether the presentation of health hazard programming, in line with the Commission's ruling, in turn gives rise to an obligation to afford time to the viewpoint of spokesmen for the cigarette advertisers to rebut such programming, and in this connection request clarification of paragraph 38 of our September 8 ruling, and specifically the following sentence: "The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials."

In accordance with your request, we shall clarify this matter. The sentence quoted in your letter states our position inaptly and is withdrawn.

In the Editorializing Report, 13 FCC 1246, 1249, where the Fairness Doctrine is spelled out, we pointed out the licensees should devote a reasonable amount of time to the discussion of controversial issues of public importance to their area. Thus, tobacco organizations are, and have always been, free to approach broadcast licensees to purchase regular programming time or suggest sustaining roundtable or other programs to deal intensively with the issue of smoking and health, on the ground that it is one of importance to the licensee's area. Whether such
883 time is to be afforded is a matter within the discretion and judgment of the licensee, as in the case of other similar programming judgments.

Your inquiry assumes that cigarette companies have purchased time on a station to present their commercials. We have held that these portray the use of the particular cigarette as attractive and enjoyable and encourage people to smoke. We said (para. 37):

> The June 30, 1967 F.T.C. Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15-16). The F.T.C. states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences and that by so doing the impression is conveyed that smoking carries relatively little risk (ibid.) . . .

A licensee may choose to present regular programming dealing with the cigarette smoking issue, (e.g., roundtable discussions or documentaries), in discharge of its fairness obligation. See para. 42, FCC 67-1029. But in view of the above, it follows that whatever way is chosen (i.e., regular programming or health hazard announcements), a

licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of the cigarette companies, so that when he presents a significant amount of time devoted to the other side (see our June 2 ruling and paras. 43 and 50 of our September 8 ruling), he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesmen in your assumed case. Rather, in the circumstances, whether time is afforded for the presentation of such additional material by these companies is a matter within the discretion of the licensee in determining whether further discussion of the "pros and cons" of this issue is called for.

884 We hope that the foregoing general material clarifies this matter and will be helpful to you. Any specific ruling would of course be made only in the context of a particular factual situation.

By Direction of the Commission
Ben F. Waple
Secretary

Concurring Statement of Commissioner Lee Loevinger

I concur in deletion of some inapt and unfortunate language from the Commission opinion of September 13, 1967, regarding cigarette advertising. However, since the Commission opinion is confused, ambiguous, loosely reasoned and certain to engender difficulties, as stated in my concurring opinion of that date, I think it would be preferable to withdraw the Commission opinion and issue one less prolix and logically more rigorous to deal with this subject.

WASHINGTON, D.C. 20554

The Tobacco Institute, Inc.
1735 K Street, N.W.
Washington, D. C. 20006

Attention: Mr. Franklin Dryden

Dear Mr. Dryden:

This is in response to your letter of October 20, 1967, petitioning for reconsideration of the Commission's letter of September 22, 1967 to Metromedia, Inc. (FCC 67-1074), in response to Metromedia's request for clarification of the Commission's Memorandum Opinion and Order of September 8, 1967 (FCC 67-1029) on the applicability of the Fairness Doctrine to cigarette advertising. Metromedia had inquired whether the presentation of health hazard pro-

gramming, in line with the Commission's ruling, in turn gave rise to an obligation to afford time to the viewpoint of spokesmen for the cigarette advertisers to rebut such programming.[1] The Commission's letter to Metromedia clarified the matter by stating, in essence, that "* * * a licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of the cigarette companies, so that when he presents a significant amount of time devoted to the other side (see our June 2 ruling and paras. 43 and 50 of our September 8 ruling), he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesman in your assumed case."

Asserting that the Commission's letter (FCC 76-1074) represented a "major substantive change" in the September 8th Order, rather than a clarification, you claim that all interested parties should have been notified and given an opportunity to present their views. You also assert that there is no basis for the Commission's decision that cigarette commercials contain health claims, and further that stations which carry health hazard claims and no cigarette advertising are obliged to present pro-smoking material.

897 Notwithstanding your contention, we believe that our letter to Metromedia did not constitute the type of action for which prior notice and an opportunity to comment was necessary or warranted. There was no complaint submitted in this matter nor any case or controversy before the Commission for determination, but simply a request by Metromedia for an explanation as to the intended meaning of one paragraph in our September 8th opinion. Nothing in the Commission's rules or in its procedures as to complaints under the "Fairness Doctrine"

[1] In requesting clarification Metromedia pointed specifically to a sentence in para. 38 of the September 8th Memorandum Opinion and Order, and the Commission withdrew that sentence for the reason that it "states our position inaptly."

requires that public notice be given prior to answering a request for clarification. In any event, our September 22nd letter to Metromedia was less than 30 days after our Memorandum Opinion and Order of September 8th, and therefore within the time period for reconsideration on the Commission's own motion. Public Notice of the letter was given (32 F.R. 13737), and any interested person could properly seek reconsideration of the substance of our letter.

With respect to your substantive objections, the contention that cigarette commercials do not make any health claim was fully treated in our September 8th Memorandum Opinion and Order and in the September 22nd letter to Metromedia. We think further comment is unnecessary.

The hypothetical situation of a station which presents health hazard claims but no cigarette commercials obviously raises a factor different from that considered in our response to Metromedia, whose inquiry assumed that cigarette commercials had been carried. Whether time must be afforded in the hypothetical circumstances you suggest is a matter which would be governed by the same principles as are applicable generally under the "Fairness Doctrine."

In sum, we think that your letter does not present any arguments which warrant reconsideration of the letter to Metromedia. Accordingly, your request for reconsideration is denied.

By Direction of the Commission

Ben F. Waple
Secretary

APPENDIX B

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,285

JOHN F. BANZHAF, III, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents*

WTRF-TV, INC. and NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN BROADCASTING COMPANIES, INC., THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS TOBACCO CO., PHILIP MORRIS, INC., R. J. REYNOLDS TOBACCO CO., UNITED STATES TOBACCO CO., P. LORILLARD CO., *Intervenors*

Nos. 21,525 & 21,526

WTRF-TV, INC. and NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents*

HEART DISEASE RESEARCH FOUNDATION, SPARTAN RADIOCASTING CO., PALMETTO RADIO CORP., W.A.V.E., INC., WFIE, INC., and WFRV, INC., INDIANA BROADCASTING CORPORATION, GULF TELEVISION CORPORATION, CORINTHIAN TELEVISION CORPORATION, GREAT WESTERN BROADCASTING CORP., COLUMBIA BROADCASTING SYSTEM, INC., WLLE, INC., NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS TOBACCO CO., PHILIP MORRIS, INC., R. J. REYNOLDS TOBACCO CO., UNITED STATES TOBACCO CO., P. LORILLARD CO., JOHN F. BANZHAF, III, *Intervenors*

No. 21,577

THE TOBACCO INSTITUTE, INCORPORATED, ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents*

On Petitions for Review of Orders of the Federal Communications Commission

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Decided November 21, 1968

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

BAZELON, *Chief Judge:* In these appeals we affirm a ruling of the Federal Communications Commission requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking. This holding rests on negative answers to the following principal questions:

(I) whether in the Cigarette Labeling Act of 1965 Congress preempted the field of regulation addressed to the health problem posed by cigarette smoking so as to deny the FCC any authority it otherwise had to issue its cigarette ruling (*infra,* pp. 9-15);

(II) if not so forbidden, whether the ruling is nonetheless unauthorized (*infra,* pp. 15-30), either

(A) because the Commission has no authority to regulate broadcast content (*infra,* pp. 19-24), or

(B) because any authority over program content which the Commission may have cannot support a ruling of this kind (*infra,* pp. 24-30); and

(III) if neither forbidden nor unauthorized, whether the ruling is unconstitutional (*infra,* pp. 30-37), either

(A) because the First Amendment permits no regulation of program content (*infra,* pp. 31-33), or

(B) because the cigarette ruling in particular violates the First Amendment (*infra,* pp. 33-37).

The history of the cigarette ruling dates to December, 1966, when citizen John F. Banzhaf, III asked WCBS-TV to provide free time in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials it broadcast.[1] Although he cited several specific commercial messages, Banzhaf's target included

> all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.

He said this point of view raised one side of a "controversial issue of public importance" and concluded that under the FCC's fairness doctrine, WCBS was under obligation to "affirmatively endeavor to make [its] . . . facilities available for the expression of contrasting viewpoints held by responsible elements. . . ."

WCBS replied that it had broadcast several news and information programs presenting the facts about the smoking-health controversy, as well as five public service

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[1] Letter from John F. Banzhaf, III to Television Station WCBS-TV, December 1, 1966.

announcements of the American Cancer Society aired free of charge during recent months.[2] On the basis of these broadcasts it was confident that "its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine." But it doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services. . . ."

Thereupon, Banzhaf forwarded the correspondence to the Federal Communications Commission under cover of a complaint that the station was violating the fairness doctrine.[3] And thereby hangs the following legal tale.

The Commission sustained the Banzhaf complaint. In a letter dated June 2, 1967,[4] it agreed that the cited cigarette commercials "present the point of view that smoking is 'socially acceptable and desirable, manly, and a necessary part of a rich full life,' "[5] and, as such, invoke the fairness doctrine. It said in part:

> We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and congressional action [1] (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe

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[2] Letter from Clark S. George, Vice-President and General Manager, WCBS-TV to John F. Banzhaf, III, December 30, 1966.

[3] Letter from John F. Banzhaf, III, to Federal Communications Commission, January 5, 1967.

[4] Television Station WCBS-TV, 8 F.C.C. 2d 381 (1967).

[5] *Id.*

that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.[6]

The Commission refused, however, to require "equal time" for the anti-smoking position and emphasized that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee . . . ." But it directed stations which carry cigarette commercials to provide "a significant amount of time for the other viewpoint. . . ." And by way of illustration it suggested they might discharge their responsibilities by presenting "each week . . . a number of the public-service announcemnts of the American Cancer Society or HEW in this field."[7]

In response to numerous petitions and requests for reconsideration, the Commission affirmed its ruling in a lengthy Memorandum Opinion.[8] It rejected contentions that the fairness doctrine is unconstitutional and that the cigarette ruling is precluded by the Cigarette Labeling and Advertising Act of 1965. The opinion did make clear that cigarette advertising *in general,* not any particular commercials, necessarily conveys the controversial view that smoking is

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[6] *Id.* at 381-82.

[7] *Id.* at 382. The Commission noted WCBS's public service programming in this area, see text at note 2 *supra,* but said "the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking." *Id.* at 383.

[8] Television Station WCBS-TV ("Applicability of the Fairness Doctrine to Cigarette Advertising"), 9 F.C.C. 2d 921 (1967), hereinafter cited as "Cigarette Advertising."

a good thing.[9] But the Commission stressed again that its ruling was "limited to this product—cigarettes" and disclaimed any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance."[10] While defending its failure to provide interested persons an opportunity to be heard before issuing its ruling, the Commission emphasized that any procedural lapse was cured by its exhaustive consideration of the many petitions for review. Finally, it concluded that, "the specifics of the Fairness Doctrine" aside, its ruling was required by the public interest.[11]

Subsequently, in response to a request for clarification, the Commission ruled that stations which carry cigarette advertising are under no obligation to provide the cigarette companies free time in which to respond to broadcast claims that smoking endangers health.[12]

In this review proceeding, the Commission is challenged at virtually every point. Mr. Banzhaf complains that the anti-smoking forces should have been granted equal time. Petitioners Station WTRF-TV, the National Association of Broadcasters, The Tobacco Institute, and eight cigarette manufacturers (hereinafter "petitioners"), all of whose

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[9] The Commission explained that it could make its ruling without having before it the text of the particular commercials cited in Banzhaf's complaint, because the controversial issue was not whether smoking is dangerous to health but whether it is desirable. *Id.* at 946 n. 30. *And see id.* at 939. The Commission said it had been cited to "no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke," and found it "difficult to conceive of one [which would not do so]." *Id.* at 938.

[10] *Id.* at 943.

[11] *Id.* at 949.

[12] Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C. 2d 16 (1967).

appeals have been consolidated, complain of almost everything else. They are supported by Intervenors CBS and NBC-ABC-WLLE Inc. The Commission is supported by the interventions of the American Tuberculosis Association and the ubiquitous Mr. Banzhaf.

We turn now to the issues these legal armies present for our consideration.

I. The Cigarette Labeling Act

We are confronted at the outset by the contention that the Commission's action is precluded by the Federal Cigarette Labeling and Advertising Act of 1965.[13] That Act requires cigarette manufacturers and importers to print on each pack the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" and provides that

> no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[14]

Since the Commission's ruling does not require the inclusion of any "statement . . . in the advertising of any cigarettes," but rather directs stations which advertise cigarettes to present "the other side" each week, it does not violate the letter of the Act.

But petitioners contend that, though Congress said only "no statement shall be required . . . in . . . advertising," it meant to forbid any regulation addressed to the smoking-health problem except the Federal Trade Commission's specifically exempted power to police false and misleading

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[13] 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39 (Supp. 1966).

[14] Federal Cigarette Labeling and Advertising Act of 1965 (hereinafter "Act") § 5(b), 15 U.S.C. § 1334(b) (Supp. 1966).

advertising.[15] In support of this proposition, they refer us primarily to the Act's Declaration of Policy, in which Congress asserts a purpose to

> establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[16]

From this declaration and from assorted snippets of legislative history, they conclude that Congress has definitively balanced the conflicting interests of the health of the public and the health of the economy and determined—in effect as a matter of law—that the public will be "adequately informed" on the smoking-and-health issue until July, 1969,[17] without any further governmental requirements.

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[15] Section 5(c) of the Act states:

> Except as is otherwise provided . . ., nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes . . . .

15 U.S.C. § 1334(c) (Supp. 1966).

[16] Act, § 2, 15 U.S.C. § 1331 (Supp. 1966).

[17] Section 10 of the Act provides that the provisions "which affect the regulation of advertising" shall terminate on July 1, 1969. 15 U.S.C. § 1339 (Supp. 1966).

The Commission, on the other hand, thought its ruling implemented a congressional policy of promoting intensive smoker-education during the life of the Act as an alternative to the "drastic step" of requiring warnings in every cigarette advertisement. Its opinion cites the express reliance in both House and Senate Reports on the anti-smoking campaigns of public and private groups as a reason for deferring stronger Congressional action.[18] And it notes that Congress itself appropriated $2 million to fund the extensive informational activities in this area of the Department of Health, Education and Welfare.[19]

This evidence does not establish unequivocally that Congress did not intend to rely exclusively on such non-coercive educational efforts to inform the public. Congress expressed no purpose in the Act of informing the public of anything except the bare fact that "cigarette smoking may be hazardous to health." Its prescribed warnings do that much and no more. They merely flash danger signals without either particularizing the danger or providing facts on which it may be appraised.

But the anti-smoking campaigns are scarcely so pervasive or so well-funded that additional information could be

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[18] The Senate Commerce Committee concluded:

> Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

S. Rep. No. 195, 89th Cong., 1st Sess., p. 5 (1965). *See also* H.R. Rep. No. 449, 89th Cong., 1st Sess., pp. 4-5 (1965).

[19] Cigarette Advertising, *supra* note 8, at 933.

regarded as mere surfeit. Accordingly, if we are to adopt petitioners' analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression. Where a controversial issue with potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring.

In the present case we find no such clear expression of restrictive intent. On the contrary, there are positive indications that Congress's "comprehensive program" was directed at the relatively narrow specific issue of regulation of "cigarette labeling and advertising." The Act was in fact passed in response to a pending Federal Trade Commission rule which would have required warnings both on packages and in all advertising.[20] Subjected to competing pressures and uncertain of the full extent of the health hazard, Congress apparently settled on half of the FTC's proposed loaf, shelved the other half for four years,[21] and expressly disclaimed any intent to affect other FTC policies

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[20] On June 22, 1964, the Federal Trade Commission promulgated a proposed regulation requiring warnings on cigarette packs from January 1, 1965, and warnings in advertising as well from July 1, 1965, unless the package warnings and voluntary advertising reforms had changed the circumstances by then. 29 Fed. Reg. 8325 (1964). The next day the House Commerce Committee began hearings on various cigarette legislation which had been introduced in the House during the 88th Congress. Those hearings and that Congress adjourned without action, but the FTC acceded to the request of Chairman Harris to postpone the effective date of the package-warning rule to July 1, 1965, so that the new Congress might legislate. 29 Fed. Reg. 15570 (1964). The 89th Congress rushed into the breach with the Cigarette Labeling Act, and as a result the FTC rule was stillborn.

[21] See Act, § 5(b), text at note 14, *supra;* § 10, *supra* note 17.

or powers.[22] Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation by other agencies—much less that it specifically meant to foreclose all such regulation.[23] If it meant to do anything so dramatic, it might reasonably be expected to have said so directly—especially where it was careful to include a section entitled "preemption" specifically forbidding designated types of regulatory action.[24]

In short, we think the Cigarette Labeling Act represents the balance drawn between the narrow purpose of warning the public "that cigarette smoking may be hazardous to health" and the interests of the economy. In that reckoning, the question of the public's need for information about the nature, extent, and certainty of the danger was left out of the scales, and so is left unaffected, except incidentally, by the result. Congress may reasonably have concluded that a warning on each pack was adequate *warning*.[25] It surely did not think the warnings were them-

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[22] Act, § 5(c), *supra* note 15.

[23] The only reference to other agencies besides the FTC in the entire Act is the declaration in Section 10 that the termination in 1969 of the provisions affecting the regulation of advertising "shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of the enactment of this Act." 15 U.S.C. § 1339 (Supp. 1966). Since all other agencies are necessarily included in the blanket ban on required warnings in advertising, this negative provision is not evidence that the Act sweeps more broadly than its words import.

[24] Act, § 5, 15 U.S.C. § 1334 (Supp. 1966).

[25] Too many bare warnings might result in an uninformed and possibly unnecessary stampede away from cigarettes. While we will not assume that Congress wished to protect the economy at the expense of life and health, it clearly did wish to protect it to the maximum extent compatible with intelligent individual decisions on the health issue. Congress gave the benefit of every doubt to the possibility that the benefits of smoking might outweigh the

selves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking.[26]

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potential danger to health; but that is not to say that it wished to conceal from the public the true extent of the danger. It is true that the anti-cigarette broadcasts required by the Commission's ruling may include uninformative propaganda as well as hard information. That possibility is a necessary consequence of the Commission's proper reluctance to dictate the content of broadcast material. See Part II, *infra*. But the ruling is reasonably designed to promote the diffusion of information; it is plainly not the substantial equivalent of the required "warnings" in advertisement which Congress has prohibited.

[26] Apart from the declaration of policy to establish a "comprehensive" program—which is meaningful only after we discover what subject matter is comprehended—petitioners rely primarily on the broad scope of the congressional hearings from which the Act emerged. The Senate Commerce Committee heard wide-ranging testimony on all aspects of the smoking-health controversy, including the views of the FCC. Congress also considered proposals for more drastic congressional action than that taken by the Act. But the fact that Congress considered and declined to adopt broader legislation does not establish that it intended to bar otherwise-authorized agency action under established powers and duties.

Petitioners also make much of the fact that the FCC, through its Chairman, specifically told Congress that it had no present plans for regulatory action addressed to the smoking-health problem and that it preferred the across-the-board approach taken by the FTC. While it is possible that had the FCC then anticipated its cigarette ruling, Congress would have expressly prohibited it, that possibility must remain in the realm of speculation. We must decide questions of legislative intent by the lights we have, not by those we might have had.

Nor do we think the FCC's 1964 disclaimer of intent to deal with the cigarette problem deprives it of authority it would otherwise have had to do so now. It is not suggested that the FCC acted in bad faith. The 1964 statement came at a time when the FTC was conspicuously taking the lead oar in attacking the problem on a media-wide front. The FCC may well have been

This relatively narrow reading of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." [27] Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising. In addition, it evidently decided that the case against smoking was not yet so overwhelming as to warrant compelling the cigarette companies to dig their own graves by neutralizing their own advertising messages.[28] Even if these policies implicitly preempt regulations *of advertising* substantially equivalent to the FTC's proposed required warnings,[29]

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reluctant in those circumstances to place a special burden on the communications industry. Primarily because of the Cigarette Labeling Act, the FTC's broad attack is now stalled. *Supra*, note 20. If the Act itself does not preempt FCC regulation, we see no reason why the FCC may not take the effects of the Act into account in assessing the need for its own action.

[27] Act, § 2, text at note 16, *supra*.

[28] In the Congressional hearings on proposed cigarette legislation, tobacco industry spokesmen appeared to view the FTC's rule requiring them to include warnings in their advertising as uniquely obnoxious. One of them, for example, told the House Commerce Committee that

> the insistence upon a warning in advertising, in addition to the demand for a warning on labels, is punitive in nature. The right to advertise—an essential commercial right—is virtually destroyed if a manufacturer is required in every advertisement to disparage the product.

Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., p. 284 (1964).

[29] The Commission thought the Act implicitly forbade a requirement that stations present warning statements immediately "adjacent" to each cigarette commercial. We need not decide whether such a requirement, though not a regulation of *advertising*, is so nearly identical to such a regulation in purpose and effect as to fall within the statute's prohibition.

they do not exclude a single, uniform regulation *of broadcasters* designed to inform the public.

II. The Commission's Authority Under the Public Interest Standard of the Communications Act.

A fundamental question, of course, is whether the Commission's ruling, though not expressly forbidden by statute, is within the scope of its delegated authority. The ruling originated in response to a "fairness doctrine" complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it "clearly has the authority to make this public interest ruling" under the public interest standard of the Communications Act and relied upon "the licensee's satutory obligation to operate in the public interest." [30]

Last year in *Red Lion Broadcasting Co.* v. *FCC*,[31] we upheld the fairness doctrine in the face of arguments that it was unauthorized and unconstitutional. Since then, in *Radio Television News Directors* v. *FCC*,[32] the Seventh Circuit has held that the Commission's personnal attack rules violate the First Amendment and, in so doing, has cast some doubt on the constitutionality of the underlying fairness doctrine.[33] These issues are now to be resolved by the Supreme Court.

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[30] Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 927.

[31] 127 U.S. App. D.C. 129, 381 F. 2d 908, *cert. granted*, 389 U.S. 968 (1967), argument postponed pending decision of the Seventh Circuit in *Radio Television News Directors Ass'n* v. *United States* (*infra* note 32), 390 U.S. 916 (1968).

[32] Nos. 16369, 16498, 16499 (7 Cir., decided September 10, 1968).

[33] The Court of Appeals distinguished the personal attack rules from the underlying fairness doctrine on two grounds. First, the rules represent an unusual particularization of the doctrine, since they impose detailed tests for determining which individual broad-

In part for this reason, we do not think protracted discussion of the fairness doctrine will materially advance our inquiry. It is clear to us that, even if incorporated into the fairness doctrine, the ruling before us is to all intents a novel application. In only one instance has the Commission previously held the advertising of a consumer product subject to the rule that broadcasters' presentations of controversial public issues must be fair and balanced.[34] The narrow issue presented by the facts of that case was whether a station in the temperance belt which advertised alcoholic beverages could, consistently with the principles now known as the fairness doctrine, refuse to accept anti-

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casts trigger the stations' duty to provide reply time and since, unlike the cigarette ruling, they also leave the stations little discretion as to how that duty may be fulfilled. Second, the personal attack rules are enforceable by penalties for individual infractions rather than solely by consideration of a station's overall performance in the proceedings for renewal of a license. *Radio Television News Directors Ass'n* v. *FCC*, *supra* note 32 (slip opinion, pp. 16-17). Nonetheless, the court expressly refused to decide the constitutionality of the fairness doctrine itself. *Id.*, p. 23. It did decide that the objective of a fair and balanced presentation of issues of public importance does not justify rules which are likely to inhibit public debate on political issues and might, by their vagueness, set up the Commission as a de facto censor of individual editorial and political broadcasts. This holding cuts very near the heart of the fairness doctrine. See Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[34] Petition of Sam Morris, 11 F.C.C. 197 (1946). This opinion in fact predates the first formal articulation of the policies now known as the "fairness doctrine" in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, *supra* note 33. But the basic requirement of fair and balanced presentation of controversial issues of public importance dates from decisions of the old Radio Commission and from the early rulings of the FCC. See *Red Lion Broadcasting* v. *FCC*, *supra* note 31, 127 U.S. App. D.C. at 138-39, 381 F. 2d at 917-18, and cases cited therein.

liquor advertising from temperance groups.[35] The case has not been followed in the twenty years since it was decided. It is not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials regardless of whether opponents buy—or even request—such broadcast time. In addition, except for the personal attack rules struck down by the Seventh Circuit,[36] we know of no case in which the Commission has so specifically defined the stations' duties under the fairness doctrine.[37] We also note that elsewhere the Commission has been hesitant to invoke the fairness doctrine where a controversial issue is raised only by implication.[38] Finally, the Commission itself concluded that its main point would be lost if the legal debate concentrated too intensely on the "specifics of the fairness doctrine."[39]

None of the novel aspects of the ruling, of course, precludes an extension of the fairness doctrine at this time. But the extension must, like the doctrine itself, find its authority in the public interest standard. Thus, whether

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[35] The Commission observed, "[I]t can at least be said that the advertising of alcoholic beverages can raise substantial issues of public importance," and concluded that the issue of whether or not to drink "may assume the proportions of a controverted issue of public importance." 11 F.C.C. at 199. It did not, however, deny renewal of the respondent station's license for failure to provide time to the temperance advocates.

[36] *Radio Television News Directors Ass'n* v. *FCC*, *supra* note 32.

[37] The Commission has, upon rare occasion, identified specific issues it regards as controversial. *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, 3 P & F Radio Reg. 259 (1946). But it has not previously gone so far as to prescribe the frequency with which opposing views must be broadcast.

[38] The Commission has refused to require reply time for atheists who wish to respond to the implicit theism of broadcast church services. Mrs. Madalyn Murray, 5 P & F Radio Reg. 2d 263 (1965). *But see*, Robert Harold Scott, *supra* note 37.

[39] Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 949.

the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same. Moreover, in view of the constitutional attack on the doctrine, the specific question of greatest long-term importance may be whether the cigarette ruling can stand on its own feet.

In fact, we think the best statement of the Commission's holding and rationale is contained in the summary paragraph introducing the "Conclusions" section of its opinion:

> There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" . . . is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it . . . . But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.[40]

[40] *Id.*

The fairness doctrine, we think, serves chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed.

The attack on the alleged statutory authority for this "public interest" ruling takes two forms: (1) a general denial that the Commission has any authority to supervise the content of broadcasting under the public interest standard; and (2) an argument that any delegation of the power to make ad hoc public interest determinations of this kind is invalid for want of adequate limiting standards.

A. *The Commission's authority over broadcast content in general*

Nothing in the Communications Act of 1934[41] expressly grants the Commission any general authority over programming. The most relevant provisions go no further than to authorize it to grant and renew broadcast licenses according to the dictates of the "public interest, convenience, and necessity."[42] A case could be made, as an abstract proposition, that this licensing power is limited to policing the traffic over the airwaves to prevent interference between stations and perhaps to assure a minimum level of technical competence. If the question were *res nova*, that case would receive substantial support from the Supreme Court decisions requiring a clear mandate for regulatory activity which brushes closely against sensitive constitutional areas.[43]

But the argument was in fact made and rejected long ago

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[41] 47 U.S.C. § 301 *et seq.* (1964).

[42] 47 U.S.C. § 307(a), (d) (1964).

[43] *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946).

in *National Broadcasting Company* v. *United States.*[44] Justice Frankfurter, speaking for the Court, said in part:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n* v. *Sanders Radio Station,* 309 U.S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio [*sic*], comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." . . . .
>
> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio . . . .
>
> These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest."[45]

In fact, neither courts nor Commission have thought it had to make its decisions among competing applicants blind-

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[44] 319 U.S. 190 (1943).

[45] *Id.* at 216-17.

folded to the content of their programs.[46] Both the old Radio Commission and the FCC have likewise refused to renew licenses on the basis of past programming not in the public interest,[47] and this Court affirmed such a refusal as long ago as 1931.[48] If agency power to designate program-

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[46] In *Simmons* v. *FCC*, 83 U.S.App.D.C. 262, 264, 169 F.2d 670 672, *cert. denied*, 335 U.S. 846 (1948), this court said:

> [W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.

See also, e.g., Henry v. *United States*, 112 U.S.App.D.C. 257, 302 F.2d 191, *cert. denied*, 371 U.S. 821 (1962); *Allen B. Dumont Laboratories* v. *Carroll*, 184 F.2d 153, 156 (3 Cir. 1950); *Bay State Beacon* v. *FCC*, 84 U.S.App.D.C. 216, 171 F.2d 826 (1948). *See generally* Note, "Regulation of Program Content by the FCC," 77 HARV. L. REV. 701 (1964) and numerous cases cited therein. Also noteworthy in this regard is the concurring opinion of Justice Brennan in *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 433 (1963), which grapples at length with the possibility that the FCC's authority to regulate advertising content is so complete as to exclude any state regulation in that area. Justice Brennan concludes that not all state regulation is excluded, but observes that Congress's "failure expressly to regulate *nondeceptive* advertising surely does not deprive the FCC of all such jurisdiction . . . ." *Id.* at 444.

[47] Community Broadcasting Service, 13 P & F Radio Reg. 179 (1965); Port Frere Broadcasting Co., 5 P & F Radio Reg. 1137 (1950); *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 U.S.App.D.C. 311, 62 F.2d 850 (1932); *cert. denied*, 288 U.S. 599 (1933); *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 60 App.D.C. 79, 47 F.2d 670 (1931).

[48] In *KFKB Broadcasting Ass'n*, *supra* note 47, this court upheld the denial of a license to a station which regularly broadcast a program in which a doctor diagnosed illnesses and prescribed medicines on the basis of symptoms described in listeners' letters. The grounds for denial were both that the doctor, who controlled the station, was using it for his own private interests and also that the

ming "not in the public interest" is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them. But Congress has apparently specifically endorsed this understanding of the public interest.[49] And whatever the limits imposed by the First Amendment, we do not think it requires eradicating every trace of a programming component from the public interest standard.[50]

"medical question box" program was "inimical to the public health and safety, and for that reason [was] not in the public interest." 60 App.D.C. at 80, 47 F.2d at 672. The court said:

> It is apparent, we think, that the [broadcasting] business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the Commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for "by their fruits shall ye know them." Matt. VII:20.

Id. at 81, 47 F.2d at 672. *Accord,* Trinity Methodist Church, South, *supra* note 47.

[49] In 1959, Congress amended the provision requiring broadcasters to provide equal time to opponents of candidates for public office who use their stations, 47 U.S.C. § 315 (1964), in order to exempt bona fide newscasts, news interviews, news documentaries, etc., from that requirement. In so doing it included the proviso that nothing in the exemption

> shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest* and to afford reasonable opportunity for the discussion of conflicting views on isues of public importance.

73 Stat. 557 (1959), 47 U.S.C. § 315(a) (1964) (emphasis added). At the very least, this language appears to be an acknowledgement of and acquiescence in the settled Commission and judicial construction that the public interest standard applies to program content.

[50] *Infra,* Part III.

The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming. It is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act[51] and the First Amendment alike. But elementary canons of administrative and constitutional law prevent the Commission from terminating a license without giving reasons or from condemning a station's overall programming as inimical to the public interest without identifying the offending material and particularizing the public interest. And if the Commission must explain its view of the public interest when it denies or revokes a license, it may surely give advance notice of its views by way of an official ruling which is subject to judicial review. Indeed, in some cases fairness to the stations may require some advance warning of their responsibilities.

Thus, in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties—*e.g.*, to strike a balance between the various interests of the community,[52] or to provide a reasonable amount of time for the presentation of programs devoted to the

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[51] Section 326 of the Communications Act of 1934 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . ., and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1964)

[52] *Editorializing by Broadcast Licensees*, *supra* note 33, 13 FCC at 1247-48.

discussion of public issues.[53] The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made.[54] In practice, the Commission rarely denies licenses for breaches of these duties.[55] Given its long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision.

In other areas, however, the Commission has on occasion imposed more specific duties or found specific programs or advertisements to be contrary to the public interest.[56] Such rulings must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship. But particularity is not in itself a vice; indeed,

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[53] *Id.* at 1249.

[54] *Id.* at 1251-52.

[55] "Generally, where objectionable matter has been broadcast in particular instances, renewal of licenses has been granted, usually upon a showing that program services were otherwise meritorious and in the public interest and the objectionable matter discontinued . . . ."

Note, "Governmental Regulation of the Program Content of Television Broadcasting." 19 G.W. L. REV. 312, 317 (1950). *See also* Note, "Regulation of Program Content by the FCC," *supra* note 46, at 703-04.

[56] *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, *supra* note 37; *KFKB Broadcasting Ass'n* v. *Federal Radio Commission, Trinity Methodist Church, South* v. *FCC*, and Port Frere Broadcasting Co., all *supra* note 47; Mile High Station, Inc., 20 P & F Radio Reg. 345 (1960); WSBC, Inc., 2 F.C.C. 293 (1936; Oak Leaves Broadcasting, 2 F.C.C. 298 (1936); Farmers & Bankers Life Insurance Co., 2 F.C.C. 455 (1936); and cases cited in Note, "Governmental Regulation of the Program Content of Television Broadcasting," *supra* note 55, at 317 n. 27, 317-18 n. 28.

in some circumstances it may serve to limit an otherwise impermissibly broad intrusion upon a licensee's individual responsibility for programming.

B. *The authority for the cigarette ruling in particular*

Thus, in the context of the Communications Act as it has long been understood, we do not think that public interest rulings relating to specific program content invariably amount to "censorship" within the meaning of the Act.[57] However, there is high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.[58]

The ruling before us neither forbids nor requires the publication of any specific material. But as an extension of the fairness doctrine it is an unusual limitation of the licensee's discretion. And as an independent public interest ruling it requires independent support. We cannot up-

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[57] See note 51, *supra*. It is not clear whether Congress originally thought that such rulings as to program content would constitute "censorship." See Note, 46 HARV. L. REV. 987, 990 (1933). But in view of the settled administrative practice of issuing such rulings and opinions, the doubtful issue of construction must be resolved in the negative. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

[58] The Supreme Court has suggested that the "public interest" standard may be narrowed by interpreting it in the light of "its context, . . . the nature of radio transmission and reception, [and] . . . the scope, character, and quality of services . . . ." *Federal Radio Commission* v. *Nelson Brothers*, 289 U.S. 266, 285 (1933). While these criteria may be sufficiently precise administrative standards to govern regulation of technical performance and selection among competing applicants, however, we think they are too amorphous, without more, to support supervision over programming.

hold it merely on the ground that it may reasonably be thought to serve the public interest.

Whatever else it may mean, however, we think the public interest indisputably includes the public health.[59] There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. The power to protect the public health lies at the heart of the state's police power. It has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations. Likewise, public health concerns now support a sizable portion of the civilian federal bureaucracy. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

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[59] Petitioners WTRF-TV and the National Association of Broadcasters argue that, if the FCC has any authority with respect to advertising, it can apply only the more specific standard Congress has established to guide the Federal Trade Commission, which they say is vested with "primary" authority to regulate advertising. Thus, they would limit the FCC's role to policing "unfair methods of competition . . . and unfair or deceptive acts or practices," Federal Trade Commission Act § 5 (1914), 15 U.S.C. § 45(a) (1964), at least absent any considerations peculiar to broadcasting. Their sole authority for that proposition is *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). That case, however, is not in point. There the FCC had adopted regulations disapproving of give-away programs on the ground that they were "lotteries" within the meaning of federal prohibitory statutes. The Supreme Court reversed on the ground that the FCC had misread the criminal statutes, but that reversal did not in itself preclude FCC authority to prohibit such programs as inconsistent with the public interest. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). In any case, the standard of the Federal Trade Act is applicable only to regulation of advertising. While the obligations imposed under the cigarette ruling arise from and are conditioned upon the broadcasting of cigarette advertising, the ruling does not regulate advertising. Rather, it has the effect of regulating stations which carry advertising by requiring them to inform the public.

The Radio Commission, predecessor to the FCC, assumed with judicial approval and without question that broadcasting of specious medical information was not in the public interest.[60] In the Communications Act of 1934, Congress transferred the Radio Commission's authority to license in the "public interest, convenience and necessity" to the FCC,[61] which has also ruled specific controversial health claims to be not in the public interest.[62] Given the premise that the "public interest" may include some of the content as well as the technical quality of broadcasting, we are satisfied that it includes the public health. But were there any initial doubt, in the absence of evidence to the contrary, we think Congress must be deemed to have acquiesced in the determinations to that effect of both Commissions on a matter of such basic and universally recognized importance.

The public health standard removes much of the vagueness and over-breadth attending the standard of the public interest. But we are not prepared to say that the Commission is authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health. Even the relatively precise concept of the public health is murky at the fringes, and in some cases what is concededly optimal health may be a less important public value than other conflicting interests. Finally, the Commission itself has no special expertise to make it the appropriate arbiter of controversies over whether particular broadcasting is dangerous to health.

But the ruling on cigarette advertising is vulnerable to none of these objections against a broad mandate to the

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[60] *KFKB Broadcasting Ass'n* v. *Federal Radio Commission, supra* note 47.

[61] 47 U.S.C. § 307 (1964).

[62] WSBC, Inc., Oak Leaves Broadcasting, Inc., Farmers & Bankers Life Insurance Co., all *supra* note 56.

Commission to consider the public health.[63] The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence. The only member of the Commission to express doubts about the validity of its ruling had no doubts about the validity of its premise that, in all probability, cigarettes are dangerous to health:[64]

> Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types

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[63] We agree with the Commission that "cigarette advertising presents a unique situation," and we note that the Commission "do[es] not now know" of any other advertised product which would warrant a comparable ruling. Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 943.

[64] The Commission correctly noted that it "is not the proper arbiter of the scientific and medical issue . . . and of course has not sought to resolve it." *Id.* at 949. But the "controversial issue" to which its ruling is addressed is not whether cigarette smoking is dangerous, but whether, in view of its authoritatively documented dangers, it is desirable:

> It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke, but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose.

Id. at 939.

> of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by Congressional reports and statute . . . . The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probablistic . . . . Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt . . . . The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt.[65]

Finally, the Commission expressly refused to rely on any scientific expertise of its own.[66] Instead, it took the word of the Surgeon General's Advisory Committee,[67] whose findings had already been adopted in substance by the Department of Health, Education and Welfare,[68] the Fed-

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[65] *Id.*, concurring opinion of Commissioner Loevinger at 952-53.

[66] See note 64, *supra*.

[67] On January 11, 1964, the report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."

Cigarette Advertising, *supra* note 8, Appendix A at 950.

[68] The Department promptly established the National Interagency Council on Smoking and Health in order, *inter alia*, to

> use its professional talents to bring to the Nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking. . . .

Id., Appendix A at 951. In 1967, HEW also released the Surgeon General's "Report on Current Information on the Health Conse-

eral Trade Commission,[69] and the Senate Commerce Committee,[70] and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act.

In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media, and the prescribed warnings on each cigarette pack, inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. Moreover, since cigarette smoking is psychologically addicting, the confirmed smoker is likely to be relatively unreceptive to information about its dangers; his hearing is dulled by his appetite. And since it is so much harder to stop than not to start, it is crucial that an accurate picture be communicated to those who have not yet begun.

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quences of Smoking," which reaffirmed the conclusions of the 1964 Report, *supra* note 67, on the basis of more than 2,000 subsequent research studies. This report asserted that cigarette smokers have substantially higher death and disability rates than comparable non-smokers and that a substantial number of earlier deaths and disabilities would not have occurred if the victims had never smoked. *Id.* at 936-37.

[69] Note 20, *supra*.

[70] While there remain [sic] a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.

S. Rep. No. 195, 89th Cong., 1st Sess., p. 3 (1965).

Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly. The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.[71]

The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the "public health."

III. The First Amendment

It is difficult to separate the First Amendment question from the question of the Commission's authority. Section 326 of the Communications Act expressly provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[72] It might reasonably be thought that "the right of free speech," is shorthand for the First Amendment. But since constructions of the First Amendment have broadened since 1934, and inasmuch as the First Amendment argument

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[71] Cigarette Advertising, *supra* note 8, at 941-42.

[72] *Supra*, note 51.

advanced in this case challenges a long-settled construction of the Act, we treat the constitutional question separately for purposes of analysis.

A. *Regulation of broadcast content under the First Amendment in general*

Intervenors NBC, *et al.* argue cogently that the public interest standard cannot constitutionally now include any component of program content. They say the First Amendment obviously would not tolerate administrative supervision of the material published by the newspaper press. The radio press was initially treated differently only because (1) peculiar technical factors require a policeman to prevent interference between different stations, and (2) the then available broadcasting channels were so limited in number that the Commission could hardly ignore all considerations of the nature and quality of programming in choosing among applicants. The first reason does not justify supervision of content, they say, and the second, if ever sufficient, is an anachronism now that the available channels often outnumber the applicants and the broadcasting stations serving most areas far outnumber the newspapers.[73] Accordingly, in their view the First Amendment now limits the Commission's licensing discretion to technological considerations; the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market.

This argument has considerable force. First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and

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[73] See *Radio Television News Directors Ass'n* v. *FCC*, *supra* note 32 (slip opinion, pp. 25-27), where the Seventh Circuit declared that the historical distinction between press and broadcasting is untenable for First Amendment purposes.

the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege."[74] It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

On the other hand, we cannot solve such complex questions by replacing one set of shibboleths with another. The First Amendment is unmistakably hostile to governmental controls over the content of the press,[75] but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets.[76] Moreover, the broadcasting medium

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[74] See G. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations*, 52 MINN. L. REV. 67, 152 (1967).

[75] *E.g., Near* v. *Minnesota*, 283 U.S. 697 (1931).

[76] It has also been suggested that a difference in the working of the market mechanism in the two media may justify a difference in the scope of permissible regulation under the First Amendment. It is in a newspaper's economic interest, it is said, to include features which may appeal only to a limited or specialized audience. The cost of adding a page to include special features is relatively small compared to the advertising and subscription revenue which may be expected from the resulting increase in circulation. But a broadcaster can appeal to only one audience at a time. If he devotes an hour to programs appealing to a minority taste, he foregoes the chance to compete for the greater advertising revenues consequent upon reaching a larger audience. Accordingly, it may

may be different in kind from publishing in a way which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[77]

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be that even newspaper monopolies are more likely than broadcasters to serve the entire public without regulatory prodding. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 714. For support from economists for the proposition that broadcasters will compete for the majority audience at the expense even of a sizeable minority taste, see J. Dirlam and A. Kahn, *The Merits of Reserving the Cost-Savings from Domestic Communications Satellites for Support of Educational Television,* 77 YALE L.J. 494, 515-17 (1968).

[77] The effectiveness of the television commercial is hardly disputed, for it alone appeals to both of man's most receptive senses—hearing and seeing. . . . Psychological memory experiments indicate strongly that people tend to remember advertising messages presented by a combination of visual and auditory methods significantly more than those presented by either method alone. See, *e.g.*, Elliott, *Memory for Visual, Auditory, and Visual-Auditory Material,* 29 ARCHIVES OF PSYCHOLOGY No. 199, at 52-54 (1936).

Note, "Illusion or Deception: The Use of 'Props' and 'Mock-ups' in Television Advertising," 72 YALE L.J. 145, 156 n. 46 (1962). *See generally,* V. Packard, THE HIDDEN PERSUADERS (1957).

B. *Constitutionality of the cigarette ruling in particular*

These considerations are at least sufficient to convince us that we are not obliged simply to "invalidate the entire course of broadcasting development"[78] with no inquiry into the particulars of the ruling before us. Rather, we think the proper approach to the difficult First Amendment issues petitioners raise is to consider them in the context of individual regulatory policies and practices on a case-by-case basis. On this approach, since the narrow public health power which supports the cigarette ruling does not "sweep . . . widely and . . . indiscriminately" across protected freedoms,[79] the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press. We reach this conclusion in the light of the following considerations:

(1) The cigarette ruling does not ban any speech. In traditional doctrinal terms, the constitutional argument against it is only that it may have a "chilling effect" on the exercise of First Amendment freedoms by making broadcasters more reluctant to carry cigarette advertising.

(2) The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech." It is established that some utterances fall outside the pale of First Amendment concern.[80] Many cases indicate that product advertising is at least less rigorously

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[78] Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

[79] *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964).

[80] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Roth* v. *United States*, 354 U.S. 476 (1957).

protected than other forms of speech.[81] Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices. In the instant case, this argument is not dispositive because the cigarette ruling was premised on the fact that cigarette advertising implicitly states a position on a matter of public controversy. But though this advertising strongly implies that cigarette smoking is a desirable habit, petitioners have correctly insisted that the advertisements in question present no information or arguments in favor of smoking which might contribute to the public debate. Accordingly, even if cigarette commercials are protected speech, we think they are at best a negligible "part of any exposition of ideas, and are of . . . slight social value as a step to truth. . . ."[82]

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[81] *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942); *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110-11 (1943); *Martin* v. *Struthers*, 319 U.S. 141, 142 n. 1 (1943); *Jamison* v. *Texas*, 318 U.S. 413, 417 (1943). In *Head* v. *New Mexico Board of Examiners*, the Supreme Court upheld as a health measure a state law prohibiting price-advertising by optometrists. 374 U.S. 424 (1963). It did not reach the First Amendment question because that question had not been properly raised in the state court. *Id.* at 433 n. 12. However, in a lengthy concurring opinion, *supra* note 46, Justice Brennan considered the principal issue to be whether in the Communications Act Congress had occupied the field of regulation of broadcast advertising. *Id.* at 433 *et seq.* There was no dissent. The Court's collective treatment of this case strongly discounts the possibility that it thought such regulation poses serious constitutional problems.

[82] *Chaplinsky* v. *New Hampshire*, *supra* note 80, at 572.

(3) In any event, the danger that even this marginal "speech" will be significantly chilled as a result of the ruling is probably itself marginal. We cannot, of course, undertake an economic analysis to determine the probability that the volume of cigarette advertising over radio and television will decline. We can say with fair certainty, however, that the cigarette manufacturers' interest in selling their product guarantees a continued resourceful effort to reach the public. We note also that cigarette advertising accounts for a sizable portion of broadcasting revenues,[83] and we think it at best doubtful that many stations will refuse to carry cigarette commercials in order to avoid the obligations imposed by the ruling.[84]

(4) Even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss. A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance.[85] That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate

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[83] The briefs indicate that radio and television revenues from cigarette advertising total nearly $300,000,000 annually and account for more than 7% of all television revenue.

[84] The Commission has in fact promised to "tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry." Cigarette Advertising, *supra* note 8, at 944.

[85] See, *e.g.*, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 148-50 (1967) (opinion of Justice Harlan); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *NAACP* v. *Button*, 371 U.S. 415, 429 (1963); *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

who can shout loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.

Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an inherent balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. If the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all.[86] But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged

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[86] The main thrust of the Seventh Circuit opinion invalidating the FCC's personal attack rules under the First Amendment is that "strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules." *Radio Television News Directors Ass'n* v. *FCC, supra* note 32 (slip opinion, p. 17). The rules themselves, the Court said, "reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills." *Id.* pp. 17-18. Thus, the Court was concerned that both the amount and the vigor of debate might be reduced.

debate is served, not hindered, by an attempt to redress the balance.[87]

(5) Finally, not only does the cigarette ruling not repress any information, it serves affirmatively to provide information. We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition. But the cigarette ruling does not dictate specific content and, in view of its special context, it is not a precedent for converting broadcasting into a mouthpiece for government propaganda. And the provision of information is no small part of what the First Amendment is about. A political system which assigns vital decisions to individual free choice assumes a well-informed citizenry. We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke.

IV. Other Contentions

The resolution of these basic questions leaves a residue of unanswered contentions. Mr. Banzhaf's complaint that the anti-smokers should have been granted equal time need not detain us. Even if it had authority to specify equal time, the Commission could reasonably find such a specific requirement an unnecessary intrusion upon the licensees'

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[87] *Cf. Radio Television News Directors Ass'n* v. *FCC*, *supra* notes 32 and 86: "[T]he rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting . . . and that it is unable to attain such fairness by less restrictive and oppressive means." (Slip opinion, p. 27) In the instant case, we think that on balance First Amendment interests are advanced by the Commission's ruling. Moreover, the additional public interest at stake is compelling. And the technique of requiring the presentation of opposing views is markedly less "restrictive and oppressive" than many attacks on the cigarett-health problem which might well be within the power of federal agencies, but for the Cigarette Labeling Act.

discretion. Likewise, the Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturers. The public health rationale which supports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might *not* be dangerous. And an issue of "fairness" arises principally because the cigarette manufacturers are deterred from making health claims in their advertisements by the FTC's warning that such claims would be "unfair and deceptive." [88] If the FTC's determination is in error, the remedy does not lie in a further particularization of the FCC's fairness doctrine.

Finally, The Tobacco Institute contends that the Commission's ruling is void on account of procedural irregularities. The initial ruling was made without providing interested parties either notice or an opportunity to be heard. But since the Commission subsequently entertained numerous petitions for review, wrote a thorough opinion affirming its ruling, and made the ruling prospective from the date of the affirming order, we find no prejudice to substantial rights. The Tobacco Institute also intimates that the Commission should have held an oral hearing, should have made factual investigations of its own, or should have instituted a full-fledged rule-making proceeding, before issuing its ruling. As a general rule, we agree that more careful procedures are required to support innovation by an administrative agency. But the essential premises of the instant ruling are only (1) that cigarette advertising inherently promotes cigarette smoking as a desirable habit, (2) that very substantial medical and scientific authority

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[88] *E.g.*, FTC, Order Vacating Trade Regulation Rule, 30 Fed. Reg. 9484, 9485 (1965). Industry codes also disapprove of affirmative health claims in cigarette advertising, but in the circumstances we hardly think this self-regulation makes out a sufficient case to require compensatory relief from the FCC.

regards this habit as highly dangerous to health and therefore undesirable, and (3) that in view of the volume of cigarette advertising, existing sources were inadequate to inform the public of the nature and extent of the danger. These premises are supported by the record. We do not see, and The Tobacco Institute has never suggested, what evidence a more extensive proceeding might have produced to refute them.

Affirmed.

WILBUR K. MILLER, *Senior Circuit Judge:* I concur in the affirmance of No. 21,285, *Banzhaf* v. *Federal Communications Commission and United States,* but I dissent from the affirmance of Nos. 21,525-6, *WTRF-TV* v. *Federal Communications Commission and United States,* and from the affirmance of No. 21,577, *Tobacco Institute, Inc.* v. *Federal Communications Commission and United States.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

No. 21,285

John F. Banzhaf, III, *Petitioner*

v.

Federal Communications Commission and
United States of America, *Respondents*

WTRF-TV, Inc. and National Association of
Broadcasters,
American Broadcasting Companies, Inc.,
The Tobacco Institute, Inc.,
The American Tobacco Company,
Brown & Williamson Tobacco Corp.,
Larus & Brother Co., Inc.,
Liggett & Myers Tobacco Co.,
Philip Morris, Inc.,
R. J. Reynolds Tobacco Co.,
United States Tobacco Co.,
P. Lorillard Co.,

Intervenors

Nos. 21,525 and 21,526

WTRF-TV, Inc. and National Association of Broadcasters *Petitioners*

v.

Federal Communications Commission and United States of America, *Respondents*

Heart Disease Research Foundation,
Spartan Radiocasting Co.,
Palmetto Radio Corp.,
W.A.V.E., Inc., WFIE, Inc., and WFRV, Inc.,
Indiana Broadcasting Corporation,
Gulf Television Corporation,
Corinthian Television Corporation,
Great Western Broadcasting Corp.,
Columbia Broadcasting System, Inc.,
WLLE, Inc.,
National Broadcasting Company, Inc.,
American Broadcasting Companies, Inc.,
The Tobacco Institute, Inc.,
The American Tobacco Company,
Brown & Williamson Tobaccco Corp.,
Larus & Brother Co., Inc.,
Liggett & Myers Tobacco Co.,
Philip Morris, Inc.,
R. J. Reynolds Tobacco Co.,
United States Tobacco Co.,
P. Lorillard Co.,
John F. Banzhaf, III,

Intervenors

No. 21,577

The Tobacco Institute, Incorporated, et al., *Petitioners*

v.

Federal Communications Commission and United States of America, *Respondents*

On Petitions for Review of Orders of the Federal Communications Commission

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission on review in these cases are hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Nathan J. Paulson,
Clerk

Dated: November 21, 1968

Senior Circuit Judge Wilbur K. Miller concurs in affirmance in No. 21,285, *Banzhaf* v. *Federal Communications Commission and United States,* but dissents from affirmance in Nos. 21,525-6, *WTRF-TV* v. *Federal Communications Commission and United States* and from affirmance in No. 21,577, *Tobacco Institute, Inc.* v. *Federal Communications Commission and United States.*

Sections 307(a) and (d) of the Communications Act of 1934, 48 Stat. 1083, 47 U.S.C. § 307(a) and (d) provide:

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow

any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

Section 309(a) of the Communications Act of 1934, 48 Stat. 1085, 47 U.S.C. § 309(a) provides:

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a) provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of

the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Section 326 of the Communications Act of 1934, 48 Stat. 1091, 47 U.S.C. § 326, provides:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Sections 2, 4, 5 and 10 of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282-84 (1965), 15 U.S.C. §§ 1331, 1333, 1334, and 1339, provide:

DECLARATION OF POLICY

SEC. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclu-

sion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

* * * * *

LABELING

SEC. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

PREEMPTION

SEC. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

(c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes,

nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

(d)(1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

* * * *

TERMINATION OF PROVISIONS AFFECTING REGULATION OF ADVERTISING

SEC. 10. The provisions of this Act which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of enactment of this Act.

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SUPREME COURT, U. S.

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49, 48, 51, 47

Nos. ____, ____, ____, ____

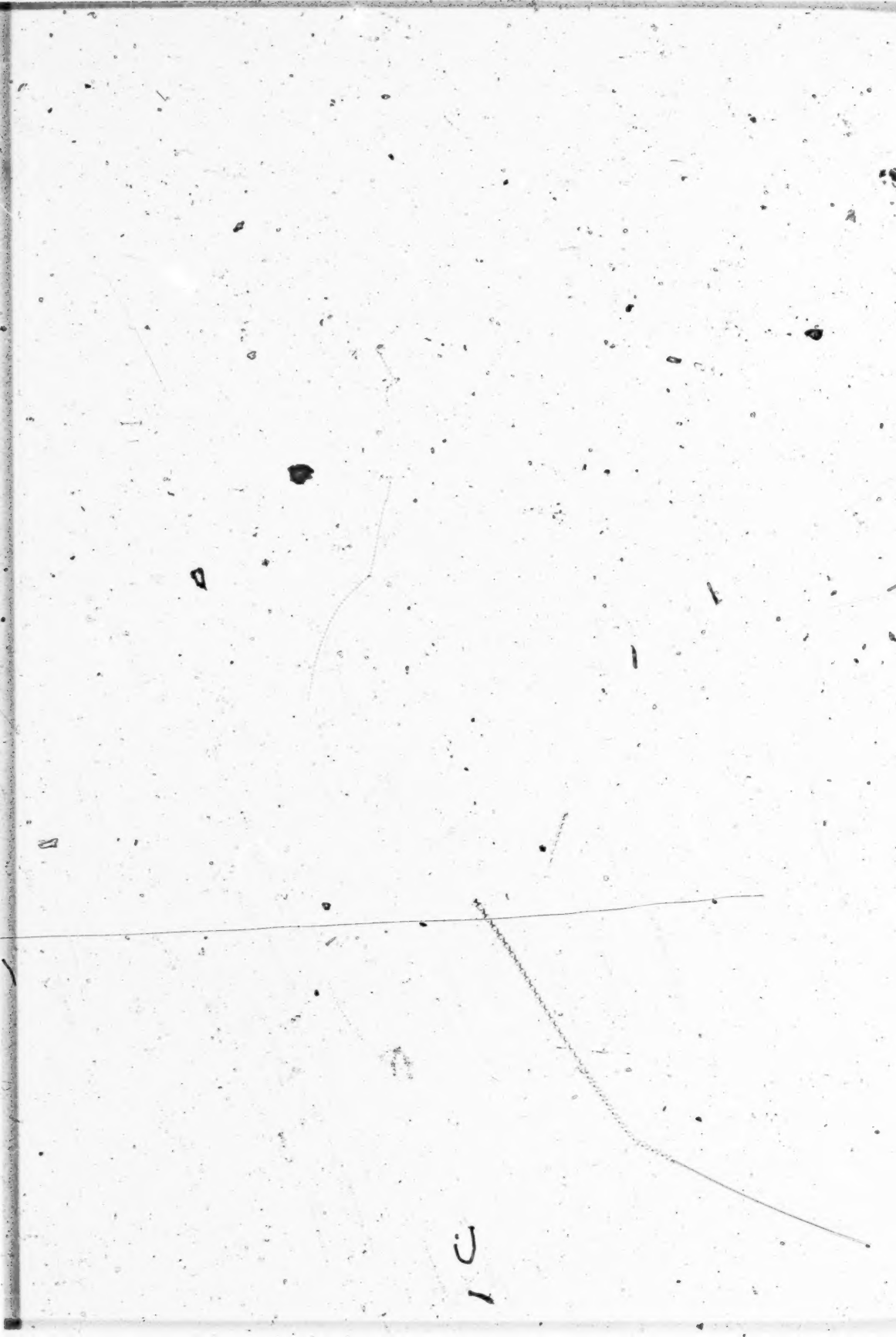
In The
SUPREME COURT OF THE UNITED STATES
October Term, [redacted] 1969

AMERICAN BROADCASTING COMPANIES, INC. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA;
NATIONAL ASSOCIATION OF BROADCASTERS et al. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA;
NATIONAL BROADCASTING COMPANY, INC. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA;
THE TOBACCO INSTITUTE et al. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT JOHN F. BANZHAF III

John F. Banzhaf III, Pro Se
ACTION ON SMOKING AND HEALTH (ASH)
2000 H St., S.W.
Washington, D.C. 20006



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STAY IN RELATED CASES

No position is taken as to whether the petitions for certiorari should be granted but it is respectfully suggested that argument in the closely related cases of Red Lion Broadcasting Co. v. Federal Communications Commission (No. 2) and United States v. Radio Television News Directors Association (No. 717) be stayed so that all three cases which involve the same basic issues can be heard together. Should this not be possible, it is respectfully suggested in the alternative that the Red Lion and R.T.N.D.A. cases should not be decided prior to the time this Court has had the opportunity to consider the facts and the arguments of counsel in the instant case. It should be noted that this Court stayed the proceedings in the Red Lion case for a considerable period of time at the request of broadcasting interests so that it could consider that case and the R.T.N.D.A. case at the same time. Only a short additional delay would be necessary to allow this Court to consider the instant case with the other two.

All three of these cases directly involve the F.C.C.'s "Fairness

Doctrine" which has been the cornerstone of its regulatory policy almost since its inception. In all three cases the constitutionality of this doctrine is challenged. Each case, however, represents a different facet of a very complex problem and it is respectfully submitted that the Court cannot deal with the heart of the matter without a clear understanding of its many ramifications. To attempt to do so may well lead to piecemeal decisionmaking or, worse yet, throwing out the baby when the problem may just be that its bath water is dirty.

The decision below rested on two alternative grounds:

(1) that under the "Fairness Doctrine" a broadcaster choosing to present commercial spot announcements arguing that cigarette smoking is advisable must also make significant time available for presenting the alternative view that cigarette smoking is dangerous to health; and

(2) that the Commission could properly find that it is not in the public interest (even apart from the "Fairness Doctrine") for a broadcaster

to advocate cigarette smoking without alerting its audience to the serious risks involved.

Implicit in both grounds is the assumption that the Commission may constitutionally consider the programming of a station in determining whether renewal of its license will serve the "public interest, convenience and necessity" under Sections 307(a) and (d) and 309(a) of the Communications Act of 1934. Although the Commission has considered the quality and value of programming as an important element in granting and renewing broadcast licenses in thousands of cases ever since the enactment of the Radio Act of 1927,[1] the constitutionality of this procedure has been thrown into doubt by the decision of the Court of Appeals for the Seventh Circuit in the R.T.N.D.A. case. Although the opinion in that case does not go so far as to hold

1. See Note, Government Regulation of the Program Content of Television Broadcasting, 19 G.W.L. Rev. 312 (1950) and Note; Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964) and cases cited therein.

that a broadcaster has a constitutional right to use the public channel assigned to him to broadcast whatever he pleases, that inference may clearly be drawn from its reasoning. Thus, the decision suggests that the Commission's regulatory power is no broader that "to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems."

The instant case, whether approached through the Fairness Doctrine or through the public interest standard of the Act, presents another facet of the same question: Is freedom of speech over the air waves a privilege to be enjoyed only by station owners and those able to buy time or may Congress constitutionally require that there be a reasonable right of access for other persons and other views.[2]

The special facet of the question displayed in this case is that

2. See J. Barron, Access to the Press-A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

here it is undeniable that access to public channels has been and will continue to be sold to the highest bidder without regard to the consequences in terms of the death and disability which necessarily result. The economic disparity between cigarette manufacturers and public health groups assures that the pleasures of cigarette smoking will be promoted unceasingly and the dangers rarely if ever mentioned unless the FCC's action is sustained.[3] Thus it presents in its clearest form the question whether broadcast channels are constitutionally similar to streets, parks, transportation terminals, and other public and quasi-public places to which access is constitutionally guaranteed--or at least may be legislatively guaranteed --for the expression of conflicting points of view, or contrariwise, whether the channels are the private and exclusive property of the licensees, to sell or use as they please, provided only that the technical standards are observed.

It is also respectfully suggested that the questions presented in

3. In 1967 the most widely advertised product on television was cigarettes with an outlay of over 250 million dollars.

the petitions for a writ of certiorari do not fairly state the legal issues.

QUESTIONS PRESENTED

It is misleading to treat the Commission decision in this case as if it were a regulation or directive that stations carry "anti-smoking commercials." The Commission has not adopted any such rule or requirement. It has merely made clear to the industry that the public issue as to the advisability of smoking is both important and controversial and that programming which advocates smoking is not exempt from the Fairness Doctrine merely because it takes the form of paid commercials.

The Commission's decision is consistent with its long-standing application of the rule of fairness to liquor commercials in Petition of Sam Morris, 11 F.C.C. 197, 3 P & F Radio Reg. 154 (1956) on similar reasoning:

> "What is for other individuals merely a routine advertising plug extolling the virtues of a beverag

> essentially no different from other types of product advertising, is for these individuals the advocacy of a practice which they deem to be detrimental to our society. Whatever the merits of this controversy *** it is at least clear that it may assume the proportions of a controverted issue of public importance. The fact that the occasion for the controversy happens to the advertising of a product cannot serve to diminish the duty of the broadcaster to treat it as such an issue."

There has been no occasion to apply the Sam Morris decision to any other product until this case, but its authority has never been questioned. The Sam Morris decision was cited in the 1949 Editorializing Report as illustrative of the Commission's view that the Fairness Doctrine "applies to all subjects of substantial importance to the community coming within the scope of free discussion

in the First Amendment..."[4] The Commission Chairman also advised the Senate Commerce Committee of the Morris decision in 1952[5] and it is discussed in a recent study for that Committee.[6]

There is nothing unusual about the procedure here. The Commission has often indicated that particular subjects fall within the Fairness Doctrine requirements or that the public service responsibilities of

4. See FCC 1246 (Para 7). The Editorializing Report has often been called to the attention of Congress. See e.g. Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong. 1st Sess. on Editorializing Practices, 1963, p. 84.

5. Hearings Before the Senate Committee on Interstate and Foreign Commerce on S. 2444, 82nd Cong. 2nd Sess. 1952, p. 7.

6. Senate Committee on Commerce, Subcommittee on Communications, Fairness Doctrine, 90th Cong. 2nd Sess. 1968, pp. 24-25.

stations require them to make their facilities available for important public matters.

During the last national campaign, the Commission issued a public notice "to call licensees" attention to the desirability of making their facilities effectively available to candidates of political office even though this may require modification of normal station format".[7] The Commission also called attention to the language of this Court in Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 as follows:

> ". . . (T)he thrust of Sec. 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit."

7. Public Notice of October 29, 1968, FCC 68-1070, 14 P & F Radio Reg. 2d 566.

and to the similar statements by the Commission in the 1960 Programming Statement and in its Memorandum to the House Subcommittee on Communications and Power.[8]

If a licensee chooses to broadcast statements in favor of smoking, he must present the other side of the issue. However, just as in dealing with political issues[9] and other Fairness Doctrine subject, his obligation is only as defined in Section 315 of the Act: "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." He can comply by presenting "anti-smoking announcements" as public service "spots", or by assigning time to documentaries, interviews, discussions, talks or any other programming which gives the other point of view.

8. FCC 60-970, 20 P & F Radio Reg. 1901; FCC 63-412, 25 P & F Radio Reg. 1731.

9. More specific rules apply to appearances by candidates under Section 315 and to political editorials under Commission rules.

It is therefore respectfully submitted that the questions presented are:

1) Does the FCC have power, in determining whether to grant or renew a station license, to consider whether the station's programming serves the public interest, convenience and necessity?

2) May the Commission reasonably determine that it is not in the public interest for a station to broadcast programs advocating the smoking of cigarettes without devoting significant time to the view that cigarette smoking is hazardous to health?

CIGARETTE LABELING ACT

It is respectfully submitted that the question as to the effect of the Federal Cigarette Labeling and Advertising Act should not be considered by this Court because all relevant provisions of the act will expire on June 30, 1969. Accordingly, any such issue is transitory and likely to be moot within a short time of the Court's decision.

ABC suggests (at 9) that this issue is not moot because there are numerous unresolved cigarette complaints pending and thousands of license renewals to be submitted. However, no action has yet been taken against any station. In the entire history of the Fairness Doctrine the FCC has never revoked a license, denied a license renewal, issued a cease-and-desist order, or levied a forfeiture. The Court need not consider this issue merely because the question may in the future become important in some such proceeding. Moreover, the issue does not involve the Constitution, does not present a substantial federal question, and has not divided the circuits.

Respectfully submitted

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1036

THE TOBACCO INSTITUTE, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 1059

NATIONAL ASSOCIATION OF BROADCASTERS AND WTRF-TV, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 1060

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 1067

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, 1a–40a[1]) is not yet reported. The ruling of the Fed-

[1] The petitions in these four cases, all seeking review of the same judgment, have a common appendix volume, which is separately bound.

eral Communications Commission, dated June 2, 1967 (Pet. App. A, 14–17), is reported at 8 F.C.C. 2d 381. The Commission's Memorandum Opinion and Order of September 8, 1967 (Pet. App. A, 37–105), denying reconsideration, is reported at 9 F.C.C. 2d 921, and a further clarifying ruling dated September 21, 1967 (Pet. App. A, 106–108) is reported at 10 F.C.C. 2d 16. The Commission's letter denying the Tobacco Institute's petition for reconsideration of the clarifying ruling (Pet. App. A, 113–115) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1968 (Pet. App. B, 41a–43a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Commission has ruled, in accordance with its Fairness Doctrine, that broadcasters who carry cigarette commercials are obliged to devote "a significant amount of time" to informing their listeners of the hazards to health which smoking may entail. The petitioners attack this ruling, raising three principal questions:

1. Whether the Commission's cigarette ruling is within the scope of its statutory authority.

2. Whether the ruling is consistent with the First Amendment.

3. Whether the Federal Cigarette Labeling and Advertising Act of 1965, limiting government regulation of cigarette advertising, took away from the Commission whatever authority it otherwise had to issue the ruling.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Sections 307(a) and (d), 309(a), 315(a), and 326 of the Communications Act of 1934, 48 Stat. 1083, 1085, 1088, 1091, as amended, 73 Stat. 557 (1959), 47 U.S.C. 307(a), (d), 309(a), 315(a), 326; and Sections 2, 4, 5 and 10 of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282–284 (1965), 15 U.S.C. 1331, 1333, 1334, 1339, are set forth in Petitioners' Appendix C, pp. 45a–49a.

STATEMENT

These cases arose from a complaint (R. 1–8) filed with the Federal Communications Commission in January 1967 by John F. Banzhaf, III, against WCBS–TV, a television station in New York City owned and operated by Columbia Broadcasting System, Inc. Mr. Banzhaf stated that WCBS–TV had carried numerous cigarette advertisements presenting the point of view that cigarette smoking is "socially acceptable, desirable, manly, and a necessary part of a rich full life," and had denied his requests under the Commission's Fairness Doctrine for time to present an opposing view with respect to the desirability

of smoking cigarettes.[2] CBS replied that it was confident that "its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine," but doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services * * *." Mr. Banzhaf then requested the Commission to investigate and take appropriate steps to insure that henceforth the station would afford a "corresponding" amount of free time for the presentation of anti-smoking material.

On June 2, 1967, the Commission issued a letter ruling on the Banzhaf complaint (Pet. App. A, 14–17), holding generally that the Fairness Doctrine is applicable to cigarette advertising and emphasizing (Pet. App. A, 15)

> * * * that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. In-

[2] In general, the Fairness Doctrine requires licensees to afford reasonable opportunities for the presentation of conflicting views on issues of public importance. The nature and history of the Doctrine are fully discussed in the Brief for the United States and the Federal Communications Commission in *Red Lion Broadcasting Co.* v. *United States* and *United States* v. *Radio Television News Directors Association*, Nos. 2 and 717, this Term, certiorari granted, 389 U.S. 968, 393 U.S. 1014.

> deed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

The Commission refused to require "equal time" for stating the anti-smoking position, stressing, in consonance with the principles underlying the Fairness Doctrine, that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee * * *" (Pet. App. A, 17). It determined simply that stations which carry cigarette commercials are required to provide "a significant amount of time for the other viewpoint * * *." (Pet. App. A, 16.) By way of illustration it suggested they might discharge their responsibilities by presenting "each week * * * a number of the public service announcements of the American Cancer Society or HEW in this field" (Pet. App. A, 16–17).

With respect to the particular question whether WCBS–TV had discharged its obligations, the Commission noted that the station had broadcast material relating to the health hazards of smoking, and thus "appear[ed] to have a continuing program in this respect." It characterized its letter as a statement of "guidelines * * * so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area" (Pet. App. A, 17).

Numerous petitions for reconsideration were filed by CBS and others including the other major networks, the National Association of Broadcasters, numerous broadcast organizations, the Tobacco Institute, and an advertising trade association. Following consideration of this and other material the Commission, on September 13, 1967, issued a Memorandum Opinion and Order reaffirming its earlier ruling (Pet. App. A, 37–105). The Commission directed that copies of the Memorandum Opinion and Order be mailed to all broadcast licensees, and further specified that its ruling would have prospective effect only (Pet. App. A, 41). Thus, stations' conduct in this area prior to the date of the Memorandum Opinion and Order would not be taken into account in connection with license renewals.[3]

In its Memorandum Opinion and Order the Commission discussed at considerable length the various objections to its ruling that were raised by the parties to the expanded proceeding on reconsideration. *Inter alia*, it rejected contentions that the Fairness Doctrine is unconstitutional and beyond the Commission's statutory authority (Pet. App. A, 42–49). It concluded that, the specifics of the Fairness Doctrine aside, the public interest standard of the Communications Act

[3] Except in the case of the formally promulgated rules relating to personal attacks (under consideration in *United States* v. *Radio Television News Directors Association*, No. 717, this Term, certiorari granted, 393 U.S. 1014), the Commission has never attempted to enforce the Fairness Doctrine otherwise than in its overall consideration of licensee performance when license renewal is sought at the end of the normal three-year license term.

"means nothing if it does not include [the] responsibility" on the part of those who broadcast cigarette commercials to advise their audiences that smoking can be harmful to health (Pet. App. A, 87). And it stressed again that its ruling was "limited to this product—cigarettes" (Pet. App. A, 75), disclaiming any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance" (Pet App. A, 76).

The court of appeals affirmed, in an opinion by Chief Judge Bazelon, writing for himself and Judge Wright, with Judge Miller dissenting without opinion (Pet. App. B, 1a–40a). The court held that the Cigarette Labeling Act did not preclude the Commission's ruling and that, "as a public health measure addressed to a unique danger authenticated by official and congressional action," the ruling was a proper implementation of the public interest standard of the Communications Act (Pet. App. B, 30a).[4] With respect to the First Amendment objections, the court stated:

> * * * [S]ince the narrow public health power which supports the cigarette ruling does not 'sweep * * * widely and * * * indiscriminately' across protected freedoms, the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this

[4] The court below also rejected Mr. Banzhaf's contention that the Commission should have ordered equal time for anti-smoking messages (Pet. App. B, 38a). Mr. Banzhaf has not sought review in this Court; nor has CBS, the original object of the ruling.

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case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press" [Pet. App. B, 34a; footnote omitted].

ARGUMENT

1. Petitioners' claim that the cigarette advertising ruling is inconsistent with the Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282, 15 U.S.C. 1331, *et seq.*, is without substance. The Act requires cigarette manufacturers and importers to print on each pack the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" (Sec. 4), and provides further that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act" (Sec. 5). Petitioners contend that the Act established a comprehensive program with respect to the smoking-health problem which the Commission has improperly invaded. The court below properly found, however, that "[s]ince the Commission's ruling does not require the inclusion of any 'statement * * * in the advertising of *any cigarettes*,' *but rather directs* stations which advertise cigarettes to present 'the other side' each week, it does not violate the letter of the Act" (Pet. App. B, 7a).

Nor has congressional intent been violated. The "comprehensive program" referred to by petitioners was actually directed, as the Act's title makes plain, only to the relatively narrow question of regulating

"cigarette labeling and advertising." Congress did not purport to inhibit the dissemination, by other means, of information regarding the hazards of cigarette smoking. The court below correctly considered that "Congress may reasonably have concluded that a warning on each pack was adequate *warning*. It surely did not think the warnings were themselves adequate information" (Pet. App. B, 11a–12a). Indeed, Congress sought to promote intensive smoker-education as an alternative to the "drastic step" of requiring health warnings in all cigarette advertising.[5] And both the House and the Senate Reports on the Labeling Act noted and expressly relied on the anti-smoking campaigns of public and private groups as a reason for deferring stronger congressional action.[6] The Commission's ruling, requiring stations which carry cigarette advertising to make general efforts to inform the public as to the possible consequences of smoking, is calculated to foster these goals, and is altogether consistent with the Act.[7]

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[5] See P.L. 89–156, Title II, Public Health Services, Chronic Diseases and Health of the Aged, 79 Stat. 589, 42 U.S.C. (Supp. II) 241 *et seq.*

[6] See S. Rep. No. 195, 89th Cong., 1st Sess., p. 5 (1965); H. Rep. No. 449, 89th Cong., 1st Sess., pp. 4–5 (1965).

[7] Petitioners rely heavily on the Commission's statement to Congress, prior to passage of the Act, that it then had no plans for regulatory action addressed to the smoking-health problem. This, they argue, deprives it of any authority it would otherwise have to act now in this area. But whatever response Congress might have made if the Commission had then anticipated its cigarette ruling must remain in the area of speculation. No petitioner suggests that the Commission sought to mislead Congress. On the contrary, the basis for Commission inaction at that time was a willingness to defer to the media-wide approach then being proposed by the Federal Trade

In any event, Section 10 of the Act provides that the advertising restrictions will expire on July 1, 1969, so that the question of their impact on what the Commission can require broadcasters to do has virtually no further significance.[8]

2. The court of appeals correctly held that the cigarette advertising ruling was within the Commission's statutory authority and consistent with the First Amendment. The ruling originated in response to the contention that cigarette advertising raises one side of a controversial issue of public importance and therefore that the established principles of the Fairness Doctrine require stations carrying such advertising to make time available for presentation of the contrasting view that smoking may be hazardous to

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Commission. Enactment of the statute thereafter effectively stalled the Trade Commission. As the court below observed: "If the Act itself does not preempt FCC regulation, we see no reason why the FCC may not take the effects of the Act into account in assessing the need for its own action" (Pet. App. B, 13a, n. 26).

Petitioners also point with horror to the fact that the Commission has proposed, in the event the Labeling Act is not extended, that cigarette advertising be entirely prohibited on radio and television. 34 Fed. Reg. 1959. While such a rule might raise difficult legal questions, the Commission's preliminary statement affords no ground for review in the instant case. Interested parties will have full opportunity to be heard in a rule-making proceeding before the Commission can take any such action, and full right to judicial review if it does so.

[8] To be sure, the Commission will in the future probably be considering, in connection with license renewals, past compliance with the cigarette ruling. But that is no reason for considering now the ruling's consistency with the Labeling Act. It would be time enough to do so if it should develop that any licensee is in fact aggrieved by application of the ruling in a renewal proceeding.

health. In the last analysis, however, both the Commission and the court of appeals considered it irrelevant whether the ruling fits precisely the mold of the Fairness Doctrine as it has developed over the years, and found the basic justification for the ruling—like that for the Fairness Doctrine itself—in the standard of "public interest, convenience, and necessity" that Congress has established as the touchstone of radio regulation.[9] As the Commission stated:

> The licensee, who has a duty "to operate in the public interest" * * * is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it * * *. But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact

[9] See, *e.g.*, 47 U.S.C. 303, 308, 309.

> that the public interest means nothing if it does not include such a responsibility. [Pet. App. A, 87.]

The court below considered that "[w]hatever else it may mean * * * the public interest indisputably includes the public health" (Pet. App. B, 25a). It agreed with the Commission that there is substantial evidence that even in normal use—as distinguished from abuse or use by persons with special susceptibilities—cigarettes pose a danger to health and indeed a danger to life itself. This fact, unique to cigarettes among the products advertised on radio and television, amply justifies a narrow requirement that stations which carry announcements promoting the use of cigarettes must also, through means chosen by the licensee, inform the public of the hazards which smoking may entail (Pet. App. B, 26a–30a). As the court of appeals put it: "We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke [Pet. App. B, 38a]."

Petitioners' attacks upon the Commission's statutory authority to issue the cigarette ruling and upon its constitutionality are premised in large measure upon the proposition that the Commission has no regulatory authority over matters affecting the content of broadcast programming. Petitioners contend that the ruling constitutes impermissible censorship of radio and television advertising and that, conversely, it amounts to impermissible governmental dictation of material that must be broadcast. But neither of these characterizations is correct. As the court of

appeals pointed out, the ruling "neither forbids nor requires the publication of any specific material" (Pet. App. B, 24a); "the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee" (*id.* at 30a).

Petitioners' broad objections to the ruling are fundamentally the same as those that are directed against the basic principles of the Fairness Doctrine in the pending cases involving the Commission's implementation of the Doctrine in the area of personal attacks.[10] Their contentions in this regard are answered in our brief on the merits in those cases, and there is no reason for the Court to consider them separately here.

The cigarette ruling, like the Fairness Doctrine generally, is calculated to foster the widest possible debate and dissemination of information on matters of public importance. To be sure, this ruling differs from the normal Fairness Doctrine situation in that the obligation to present anti-smoking material is triggered not by direct statements that smoking is beneficial or not harmful, but by advertising for particular brands of cigarettes which urges their use but presumably makes no direct statement with respect to health. Surely, however, the public interest in being informed is not diminished by the fact that the manufacturer chooses to advance his end of selling cigarettes by the powerful blandishments of advertising

[10] *Red Lion Broadcasting Co.* v. *United States*, No. 2, this Term, certiorari granted, 389 U.S. 968; *United States* v. *Radio Television News Directors Association*, No. 717, this Term, certiorari granted, 393 U.S. 1014.

rather than by factual presentation or rational discussion. Where, as here, one party to a debate (the cigarette manufacturer) has economic interests and resources unmatched by any opponent, and where the public stake in the argument is demonstrably vital, we think the First Amendment and the public interest are served—as they are under the Fairness Doctrine generally—by an attempt to redress the balance.

The features that might be said to distinguish the cigarette ruling from traditional Fairness Doctrine obligations thus create no special problems under the Constitution or the Communications Act. Moreover, the ruling lacks many of the characteristics that the opponents of the personal attack policy and rules have singled out for attack. Unlike the personal attack cases, the instant cases do not involve any requirement that a particular individual be given broadcast time; the manner in which contrasting views are to be presented is left entirely to the discretion of the station licensee. There is here no such obligation of notification and provision of transcripts or summaries as is objected to in the personal attack cases. Nor is there any element whatever of possible uncertainty as to when the reply obligation arises. Moreover, as the court of

appeals noted, the "speech" affected by the cigarette ruling—product advertising—has had a limited status under the First Amendment.[11] Thus, even if the Court were to decide against the Commission in the personal attack cases, it would not follow that there is any impropriety in the cigarette ruling.[12]

CONCLUSION

Because of the relationship between some of the issues in these cases and some of the issues in Nos. 2 and 717, the Court may consider it appropriate to defer ruling upon these petitions until it decides Nos. 2 and 717. However, for these reasons stated, we submit that these

[11] *Valentine* v. *Chrestensen*, 316 U.S. 52; *Breard* v. *Alexandria*, 341 U.S. 622, 642. See also *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424.

[12] The argument is also made that the cigarette ruling is void because the Commission's original letter was sent to WCBS–TV without notice to interested parties or an opportunity for them to be heard. The court below properly answered this contention, pointing out that the Commission subsequently entertained numerous petitions for reconsideration stating the views of broadcasters and cigarette manufacturers, wrote an elaborate opinion justifying its reaffirmation of the ruling and made the ruling prospective only from the date of the order on reconsideration. The court of appeals further rejected the contention that the Commission should have held an oral hearing, properly stating that the premises upon which the order was based were adequately supported by the record and that no showing had been made that any further evidence would have been material.

petitions present no questions that warrant plenary review.

Respectfully submitted.

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THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., THE LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1036

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., THE LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

REPLY BRIEF FOR PETITIONERS

We agree with the suggestion of the Solicitor General that the Court may appropriately defer ruling on the present petition until after it decides *Red Lion Broadcasting Co.* v. *United States,* No. 2, and *United States* v. *Radio Television News Directors Ass'n,* No. 717. However, we disagree with the Solicitor General's contention that the present petition can be disposed of in any event without plenary review. If the Court holds in Nos. 2 and 717 either that the Federal Com-

munications Commission lacks statutory authority to adopt and implement the "Fairness Doctrine," or that the doctrine is violative of the First Amendment, then the judgment in the present case cannot remain standing. On the other hand, if the Court sustains the position of the Commission in those cases, we submit that plenary review of this case should be had because the issues involved here go far beyond the questions raised in *Red Lion* and *News Directors*.[1]

1. The Solicitor General argues that in this case, unlike the "personal attack" cases, there is no "requirement that a particular individual be given broadcast time." (Br. in Opp., p. 14.) This distinction is without constitutional significance. It is not the designation of a particular spokesman who must be accorded time but the dictation of required *content* by the FCC which contravenes the First Amendment. In the "personal attack" situation, the broadcaster's obligation is fulfilled if he simply affords the person attacked a reasonable opportunity to present whatever that person deems to be an appropriate reply. Under the present ruling, on the other hand, the broadcaster is obliged to present free of charge a particular prescribed message—*i.e.*, that smoking may be a health hazard. It is small comfort that the broadcaster may have some leeway in formulating the precise phraseology. Inexorably, the message, which is the "party line" taken by some federal agencies on the smoking-and-health issue, must be presented. And it must be presented *by the broadcaster himself*, unless he is able to find someone else to do so. As the Solicitor General ac-

[1] Once those cases are decided, we would propose to discuss their applicability to the present case in a supplemental brief filed pursuant to Rule 24(5) of this Court.

knowledged in the oral argument in this Court in *News Directors,* a rule whereby "the licensee [is] required himself to broadcast information of a certain kind" would present "a harder question." (Arg. Tr., p. 74.)[2] In these respects, the FCC in the present situation has abdicated the role of "town meeting moderator," to which the Solicitor General analogized its position in his oral argument in *Red Lion.* As the Solicitor General pointed out, such a moderator "does not force anyone to speak. When someone wants to speak, he does not tell him what to say." (Arg. Tr., April 2, p. 29.)

2. The Solicitor General also notes that in the present case, unlike the "personal attack" cases, "there is no . . . obligation of notification and provision of transcripts." (Br. in Opp., p. 14.) Presumably, this consideration bears on the extent of the burden imposed upon broadcasters by the FCC. In the argument in *News Directors,* responding to Mr. Justice White's question whether "it would change your argument any if it appeared that . . . a large amount of the regular content of television broadcasts were covered by these rules," the Solicitor General stated, "Why, yes, of course, Mr. Justice. The extent of the burden would be a matter for consideration . . . ." (Arg. Tr., p. 12.)

Plainly, the cigarette ruling imposes heavier burdens on broadcasters than either the "Fairness Doctrine" or the "personal attack" rules. The obligations there are infrequent and episodic; here they are continual and regularly recurring. The broadcaster must devote

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[2] "Arg. Tr." refers to the transcripts of the oral arguments in *Red Lion* and *News Directors* on April 2 and 3, 1969, prepared by Alderson Reporting Company, copies of which are on file in the Library of this Court.

"a significant amount of time each week" to propagating the anti-smoking message.[3] Unlike the situation in *Red Lion* (see Arg. Tr., April 3, p. 34), the FCC has ruled in this case that the broadcaster cannot fulfill his obligation simply by utilizing time which he has otherwise set aside for public service messages. (Memorandum Opinion and Order, App. A, p. 75, n. 25.)[4] And, in its first decisions implementing the present ruling, which were released on March 26, 1969, after the present petition was filed, the FCC held that its ruling as to cigarettes requires broadcasters to devote not just any time but significant amounts of "prime time"—*i.e.*, 7:30 p.m. to 11:00 p.m.—to anti-smoking messages.[5]

3. The Solicitor General states that there is no uncertainty in this case "as to when the reply obligation arises." (Br. in Opp., p. 14.) This categorical statement is unfounded.[6] Moreover, there is considerable

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[3] As we pointed out in our Petition, cigarettes are not unique among products advertised on radio and television in being the subject of a health or safety controversy regarding their normal use. (Pet., pp. 21-23.) But even if, contrary to our submission, the present ruling could be validly confined to this product, the "uniqueness" of the ruling in no way gainsays its enormous impact on the daily operations of broadcasters.

[4] "App." refers to the separately bound Appendix to the Petition for Certiorari in this case.

[5] *In re National Broadcasting Co.*, FCC Docket Nos. 69-270 and 69-271; *In re Metromedia, Inc.*, FCC Docket No. 69-272.

[6] There is presently a heated dispute within the FCC itself over whether "billboard" announcements—*e.g.*, "This program has been brought to you by [a particular brand] the cigarette with real tobacco taste"—constitute "cigarette advertisements" for purposes of evaluating stations' performance under the present rule. See dissenting opinions of Commissioner Johnson in the *NBC* cases, *supra*, n. 5.

uncertainty as to the magnitude of the obligation imposed by the present rule. At the risk of losing their licenses, broadcasters are left to speculate whether the FCC will consider that the amount of time they devote each week to anti-smoking programs is "significant" enough. In rulings released on March 26, 1969, the FCC admonished a number of broadcasters, which the Commission acknowledged had all "made substantial efforts to meet [their] obligations," that "greater effort is called for." The Commission did not specify how much "greater effort" it wanted, but it instructed the stations to submit, within sixty days, "a statement of your future policies in this area, and, within four months, "a report of your efforts to implement such policies."[7] Obviously, the scope of the present regulation is as least as uncertain as that of the "personal attack" rules.

4. Finally, the Solicitor General states that this case is different from Nos. 2 and 717 on the ground that product advertising "has had a limited status under the First Amendment." (Br. in Opp., p. 15.) Whatever its validity, this proposition cannot seriously be advanced in the present context—where the FCC's opinion, the decision of the Court of Appeals, and the Solicitor General's argument proceed from the premise that cigarette advertisements are tantamount to "discussions" and the presentation of a point of view concerning a controversial issue of public importance. (See Br. in Opp., pp. 13-14.)

Far from having a "limited status," under the present ruling, cigarette advertising triggers a reply obligation substantially more pervasive than any "personal attack" or genuine "discussion" ever has.

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[7] See n. 5, *supra*.

CONCLUSION

For the foregoing reasons and those set forth in our Petition for Certiorari, we respectfully submit that, should this Court rule in *Red Lion* or *News Directors* that the "Fairness Doctrine" or the "personal attack" policy violates that First Amendment or exceeds the FCC's statutory authority, it would follow that the ruling in the present case must be reversed. Even if the Court upholds the FCC in Nos. 2 or 717, however, plenary review of the significantly farther-reaching requirement in this complementary case is fully warranted.

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No. 47

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1036

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

In our Reply Brief in this case, we agreed with the Solicitor General's suggestion that this Court defer ruling on our Petition for Certiorari until the decision in *Red Lion Broadcasting Co.* v. *FCC* and *United States* v. *Radio Television News Directors Association,*

Nos. 2 and 717, O.T. 1968. Those cases have now been decided by this Court in an opinion rendered June 9, 1969. This Supplemental Brief is submitted pursuant to Rule 24(5) of this Court to discuss the applicability of those cases to and of *NLRB* v. *Wyman-Gordon Co.*, 89 Sup. Ct. 1426 (April 23, 1969) to the present case.

The decision in *Red Lion* and *RTNDA* was this Court's first confrontation with the so-called "Fairness Doctrine" as created and applied by the FCC. This Court plainly envisaged that it would not be the last, and that clarification of the scope and reach of the doctrine can come about only through case-by-case adjudication. As the Court stated:

> "We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable [citation omitted], but will deal with those problems if and when they arise." Slip Opinion, p. 27.

This Court's decision in *Red Lion* and *RTNDA* was thus carefully limited to the specific situations before it. *Red Lion* involved "the application of the fairness doctrine to a particular broadcast" (Slip Opinion, p. 2)—a personal attack on an individual who wished to reply but was refused free reply time by the licensee. In effect, the licensee was acting as censor over access to the airwaves, and this Court held that "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." Slip Opinion, p. 24. *RTNDA* merely upheld *on their face* the regulations promulgated by the FCC during the *Red Lion* litigation to make more precise the personal attack aspect of the "Fairness Doctrine."

RTNDA settled no question of application even of the personal attack regulations, much less any other question arising under the "Fairness Doctrine."

Thus neither *Red Lion* nor *RTNDA* comes close to resolving the difficult questions presented by this case, about which the court below stated:

> "It is clear to us that, even if incorporated into the fairness doctrine, the ruling before us is to all intents a novel application. . . . [A]s an extension of the fairness doctrine, it is an unusual limitation of the licensee's discretion. And as an independent public interest ruling it requires independent support. We cannot uphold it merely on the ground that it may reasonably be thought to serve the public interest." (Appendix to Petitions for Certiorari, pp. 15a, 24a-25a.)

We submit that this case is an appropriate vehicle to resolve some of the issues expressly left for future decision by this Court in *Red Lion* and *RTNDA*. For example, this Court stated in those cases:

> "We need not and do not now ratify every past and future decision by the FCC with regard to programming. *There is no question here . . . of the official government view dominating public broadcasting.*" Slip Opinion, p. 27. (Emphasis supplied.)

The question of the "official government view dominating public broadcasting" is presented by the FCC's cigarette ruling. The FCC has singled out a product—cigarettes—for unique application of the "Fairness Doctrine" to commercial advertising because some governmental agencies, including the FCC, have reached the conclusion that cigarette smoking is inju-

rious to health. In upholding the cigarette ruling, the court below stated:

> "[the FCC] took the word of the Surgeon General's Advisory Committee, whose findings had already been adopted in substance by the Department of Health, Education, and Welfare, the Federal Trade Commission, and the Senate Commerce Committee, and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act." (Appendix, *supra,* pp. 28a-29a.)

The cigarette ruling is thus a clear example—the first and hopefully the last—of the FCC's acting to propagate an official governmental point of view over the airwaves on a controversial issue of public importance. The FCC's determination to propagandize the public is not episodic or sporadic—in requiring licensees to provide substantial amounts of prime time each week to broadcast the anti-smoking position favored by the FCC, the Commission envisages an anti-smoking campaign of large dimensions. Nothing in *Red Lion* or *RTNDA,* however, purports to validate the FCC's power to saturate the airwaves with an official governmental view on cigarettes or any other subject. It would indeed be regrettable if the FCC regarded the decision in *Red Lion* and *RTNDA* as a charter for it to prescribe the content of programming in accordance with governmental policy.

Moreover, this Court clearly indicated in *Red Lion* and *RTNDA* that the FCC has no mandate for arbitrariness or application of the "Fairness Doctrine" by fiat. The FCC's distinctions in applying the "Fairness Doctrine" must be substantial and rational. As this Court stated:

> "we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic con-

ception of the public interest . . . ." Slip Opinion, p. 27.

We submit that the FCC's singling out of cigarette advertising for application of the "Fairness Doctrine" cannot be squared with its obligation to reach principled decisions. This Court in *Red Lion* and *RTNDA* found that the "Fairness Doctrine" itself was supported by "[t]hirty years of consistent administrative construction" and express acceptance of that construction by Congress. Slip Opinion, p. 13. No history of administrative construction and congressional acceptance supports the application of the "Fairness Doctrine" to commercial advertising, much less its application to a single product. The court below conceded the novelty and uniqueness of the cigarette ruling.

Applying the "Fairness Doctrine" to cigarette advertising and not to advertising for other products about which there is also public controversy is indeed "idiosyncratic." No rational justification for this distinction has yet been offered by proponents of the ruling—except perhaps the impermissible contention that cigarettes should be treated differently on the erroneous assumption that they have been singled out by various governmental agencies and there is a need to "educate" the public as to the views of these governmental agencies.[1]

In its opinion in *Red Lion* and *RTNDA*, this Court indicated that a "discriminatory refusal" by the FCC

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[1] As we pointed out in our Petition for Certiorari, pp. 21-22, it is not even true that cigarettes have been singled out by other governmental agencies for special treatment. Many other products have become the subject of public controversy and governmental reports and regulation.

to apply the "Fairness Doctrine" would raise a serious First Amendment issue. Slip Opinion, p. 27. Discriminatory application of the doctrine by the FCC is equally subject to challenge on grounds of unconstitutionality and lack of statutory authority. The cigarette ruling embodies a discriminatory application of the "Fairness Doctrine" by the FCC.

In consideration of the arbitrariness of the cigarette ruling, it is also relevant to note the important procedural differences between the FCC's actions in *Red Lion* and *RTNDA* on the one hand and in the present case on the other. In *Red Lion,* although a formal adjudicative proceeding was not held, the licensee was given notice and opportunity to be heard before decision by the FCC. In *RTNDA,* the FCC commenced a formal rule-making proceeding, elicited the comments of all interested parties, and then reached its decision.

By contrast, in the present case the FCC handed down its initial decision without even giving the licensee complained against notice of the complaint and opportunity to reply. Although the decision affects all licensees in the country, no other persons were given an opportunity to be heard. It was only *after* the FCC had decided to apply the "Fairness Doctrine" to cigarette advertising that it accepted submissions from interested parties, mainly in the form of petitions for reconsideration, but even then it refused to hold a formal rule-making proceeding, accorded no oral hearing to any one, and came to its decision without making a factual record.

By this extraordinary procedure—violating the norms for adjudicatory as well as for rule-making

proceedings—the Commission adopted a formal rule. The Commission expressly made its rule applicable to all licensees and gave it prospective effect only. This action cannot be squared with this Court's decision, handed down on April 23, 1969, in *NLRB* v. *Wyman-Gordon Co.*, 89 Sup. Ct. 1426. As the Court held in that case, "There is no warrant in law for the [Commission] to replace the statutory scheme [of the Administrative Procedure Act] with a rule-making procedure of its own invention." *Id.* at 1429. Surely *Red Lion* and *RTNDA* were not intended to validate applications of the "Fairness Doctrine" reached without regard for basic procedural fairness or elementary principles of administrative decision-making.

Finally, we emphasize that the question of the conflict between the cigarette ruling and the preemption provisions of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39, remains as live and substantial as ever. *Red Lion* and *RTNDA* were solely concerned with the Communications Act of 1934, not with the interplay of that Act with any other federal statute.

The preemption problem shows no signs of evaporating. On May 28, 1969, the House Committee on Interstate and Foreign Commerce reported a new bill, H.R. 6543, which would extend the preemption provisions of the present law until July 1, 1975. See H.R. Rep. No. 289, 91st Cong., 1st Sess. As we pointed out in our Petition for Certiorari, p. 26 n. 19, wholly apart from whether the preemption provisions are extended, the cigarette ruling has had immediate and potentially serious consequences for licensees since its promulgation in September 1967. If the cigarette ruling is unlawful for any reason, including conflict

with the Federal Cigarette Labeling and Advertising Act, it should not be left to dangle over licensees.

CONCLUSION

For these reasons, and those already presented in our Petition for Certiorari and our Reply Brief, we respectfully submit that this Court should grant certiorari in this case.

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June 11, 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 47

THE TOBACCO INSTITUTE, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 48

NATIONAL ASSOCIATION OF BROADCASTERS AND WTRF-TV, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 49

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 51

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

On June 23, 1969, the Court invited the Solicitor General to express the views of the respondents with

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respect to the applicability to these cases of the opinion in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* Nos. 2 and 717, O.T., 1968, decided June 9, 1969. This supplemental memorandum is submitted in response to that request.

The ruling of the Federal Communications Commission which the petitioners attack in this case requires a broadcaster who presents cigarette commercials to inform "his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user" (Pet. App. A, p. 87). While this cigarette advertising ruling originated in the traditional framework of the Fairness Doctrine that was before the Court in *Red Lion,* both the Commission and the District of Columbia Circuit properly considered it irrelevant to try to fit the ruling into the precise mold of that Doctrine. Rather, they found its basis—like that of the Fairness Doctrine itself—in the Commission's fundamental mandate to assure that broadcasters serve the statutory standards of "public interest, convenience, and necessity": In our view, the *Red Lion* decision's endorsement of the public interest mandate, as "a broad one, a power 'not niggardly but expansive'" (sl. op. p. 11), serving the First Amendment rather than conflicting with it, firmly supports its exercise in the ruling attacked in these cases.

The petitioners' contentions under the Constitution and the Communications Act are in substance that the cigarette advertising ruling is improper because it requires licensees to give significant expression to a

point of view to which they might otherwise give less emphasis or none. They complain that they are in effect being reduced to organs of government propaganda. The answer to this is essentially that which was sustained in this Court's *Red Lion* decision: The content, format, specific volume and timing of programming remain in the licensee's discretion and there is no barrier to his carrying pro-smoking discussions. The obligation to present anti-smoking viewpoints arises not because the government as an institution opposes smoking but because smoking and health are matters of public concern as to which, as the court of appeals recognized, there is a need for "facts and information vital to an informed decision to smoke or not to smoke" (Pet. App. B, 38a, 29a–30a). In other words, the ruling is simply an effort to assure adequate and fair coverage of an important issue where, without the ruling, the circumstances are such that only a one-sided presentation will be made.

Thus, what the Commission has done here is essentially what the Court endorsed in *Red Lion*. In the words of *Red Lion*, "the public interest language of the [Communications] Act authorized the Commission to require licensees to use their stations for discussion of public issues, and * * * the FCC is free to implement this requirement by reasonable rules and regulations * * *" (sl. op. pp. 13–14). As the Court further observed:

> [T]he Commission is not powerless to insist that [licensees] give adequate and fair attention to public issues. It does not violate the

> First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. * * * [Sl. op. p. 25.]

The emphasis of *Red Lion's* endorsement of the Fairness principle is properly not upon any right of reply as such but rather upon the right of viewers and listeners to be informed and to be exposed to ideas on important questions. In the specific context of *Red Lion* the broadcaster's resulting obligation to enlighten is triggered by a political endorsement or a personal attack relating to an important public issue. In the present context it is triggered by the carriage of cigarette advertising. But the important element is not so much what triggers the obligation as the underlying obligation itself, and that is the same in both situations.

Of course there are limits on the Commission's powers over programming. The Court recognized this in *Red Lion,* but considered that decision of that case did not require the Court to pass upon "every past and future decision by the FCC with regard to programming" (sl. op. p. 27). Similarly, as the court below recognized, approval of the cigarette advertising ruling does not require the courts to give the Commission a license to "scan the airwaves for offensive material" (Pet. App. B, p. 30a), or to establish "a precedent for converting broadcasting into a mouthpiece for government propaganda" (Pet. App. B, p. 38a). The court of appeals took great pains to isolate the unique medical, economic and legal factors

underlying this particular ruling and concluded that they justified special treatment of the problem of smoking and health. That conclusion was correct and just as in *Red Lion,* the Court should not undertake here a comprehensive delineation of the Commission's authority in the delicate area of program regulation.

For the foregoing reasons, as well as those stated in our brief in opposition, we submit that these cases raise no questions warranting plenary review that have not been decided in *Red Lion.* Therefore, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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AUGUST 1969.

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